

UNITED STATES OF AMERICA

IN SENATE

NOV 24

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

IN RESPONSE TO A RESOLUTION OF THE SENATE

PASSED MAY 10, 1890

WASHINGTON

1891

(24,922)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 248.

AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

UNITED STATES HORSE SHOE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
PENNSYLVANIA.

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1 Among the Rolls, Records and Judicial Proceedings of the Court of Common Pleas of the County of Erie, in the Commonwealth of Pennsylvania, at No. 29 of May Term, 1914, wherein United States Horse Shoe Company Plaintiff and American Express Company Defendant there is contained the following, to-wit:

*Copy of Appearance Docket Entry.*

No. 29, May Term 1914.

29.

JOHN L. RILLING, UNITED STATES HORSE SHOE COMPANY,  
vs.  
CHAS. F. PATTERSON, AMERICAN EXPRESS COMPANY.

February 11, 1915.—Summons in Trespass Returnable first Monday in March 1914, February 18, 1914. By paper filed Charles F. Patterson Esq. appears for the Defendant.

February 12, 1914.—Summoned the within named American Express Company by handing L. L. Clark, Agent of said Company at Erie, Pa., a true and attested copy of this writ and making known contents thereof to him personally so ans. Max B. Haibach, Sheriff, July 16, 1914. Plaintiff's Statement filed July 22, 1914. By paper filed Defendant by Attorneys pleads not guilty No. 4773 on Issue List. No. 41 on December 1914. Trial List December 7, 1914. Passed to January 1915 No. 21 on January 1915. Trial List January 11, 1915. Continued to February 1915, Feb'y 4, 1915. A Jury called empanelled and sworn viz Wm. Evers, John Paterson, Sam Purcell, H. S. Reichenheim, Bruce L. Banks, Wm. Zuern, Ed. Teyler, James Cull, Geo. Ensign, Harry Hayes, F. O. Crow, Wm. W. Dudenhofer, February 5, 1915. Defendant's points filed February 6, 1915. The Jury say they find for the Plaintiff for the sum of \$1,916.70 February 15, 1915. Plaintiff's Bill of costs filed same day Jury fee paid by John S. Rilling Esq. and Judgment entered on the verdict H. L. Brevillier, Prothonotary, February 26, 1915. Bond on appeal to the Supreme Court of Pennsylvania filed same day. Certiorari from the Supreme Court of Penna. with rule on Appellee to appear and plead on the return day of the writ filed Feb. 26, 1915. On motion for an order to have the stenographer transcribe and file the notes of testimony taken in the above stated case "Motion granted Per Curiam W. March 29, 1915. Stenographer's notes of testimony filed.



	Defendant's name.	Plaintiff's name.	No.	Term.	Year.
Verdict . .	American Express Co.	United States Horse Shoe Co.	29	May	1914
Judgment	American Express Co.	United States Horse Shoe Co.	29	May	1914

Penal debt.	Real debt.	Interest.	When entered.
.....	1916.70.....	Feb. 6, 1915.	Feb. 6, 1915.
.....	1916.70.....	Feb. 6, 1915.	Feb. 15, 1915.

3    **ERIE COUNTY, ss:**

The Commonwealth of Pennsylvania to the Sheriff of said County,  
Greeting:

[SEAL.]

We command you that you summon American Express Company late of your county, yeoman, so that it be and appear before our Judges at Erie, at our Court of Common Pleas, there to be held for the county of Erie, the first Monday in March next, to answer United States Horse Shoe Company of a plea of Trespass and have you then and there this writ.

Witness the Hon. Emory A. Walling, President Judge of our said Court, at Erie, the 11th day of February in the year of our Lord one thousand nine hundred and fourteen.

H. L. BREVILLIER,  
*Prothonotary.*

February 12, 1914.—Summoned the within named, American Express Company, by handing L. L. Clark, Agent of said company at Erie, Pa., a true and attested copy of this writ and making known contents thereof to him personally.

**Sheriff's Fees:**

Writ .....	\$1.00
Copy .....	.25
Service .....	1.00
Mileage .....	.12
	<hr/>
	\$2.37

Paid Feb. 26, 1914.

By Att'y JNO. S. RILLING.  
MAX B. HAIBACH, *Sheriff.*

So. Ans.

MAX. B. HAIBACH, *Sheriff.*

Endorsement: No. 29, May Term, 1914—United States Horse Shoe Company vs. American Express Company—#20—Summons in Trespass—Returnable first Monday in March 1914—John S. Rilling.

4 In the Court of Common Pleas of Erie County, Penn.

No. 29, May Term, 1914.

UNITED STATES HORSE SHOE COMPANY

vs.

AMERICAN EXPRESS COMPANY.

*Præcipe for Appearance.*

To H. L. Brevilier, Esq., Prothonotary:

Enter my appearance for the defendant in the above entitled cause.

CHARLES F. PATTERSON,  
*Attorney for Defendant.*

February 17, 1914.

Endorsement: No. 29 May Term, 1914—United States Horse Shoe Company vs. American Express Company—Præcipe for Appearance—Filed Common Pleas Feb. 18, 1914—Charles F. Patterson, 865 Frick Building Annex, Pittsburgh, Pa.

5 Common Pleas of Erie County.

No. 29, May Term, 1914.

UNITED STATES HORSE SHOE COMPANY

vs.

AMERICAN EXPRESS COMPANY.

*Plaintiff's Statement.*

ERIE COUNTY, ss:

The United States Horse Shoe Company, the above named plaintiff, has brought this suit to recover from the American Express Company, the above named defendant, the sum of Three Thousand Dollars (\$3,000.00), being the value of a yearling filly, and the following is a statement of the plaintiff's claim.

The plaintiff avers that on or about August 23, 1913, through its agent, W. B. Mitchell, it delivered to the defendant company, a common carrier for hire at Milwaukee, Wisconsin, one mare and one colt, a yearling filly, said yearling filly being of the value of Three Thousand Dollars (\$3,000.00). Said mare and filly to be by the said defendant company forwarded for hire to the plaintiff at Erie, Pennsylvania; that the said defendant company did, as a common carrier, receive said mare and said colt so delivered to it by the said plaintiff at Milwaukee, Wisconsin, and agree to safely forward the same to the plaintiff at Erie, Pennsylvania.

That the said colt or yearling filly so owned by plaintiff and by it

delivered to the defendant at Milwaukee, Wisconsin, was a valuable filly in a good, sound condition, about one year of age, and of the value of Three Thousand dollars (\$3,000.00).

The plaintiff further avers that the said defendant company is a common carrier for hire and as such accepted said yearling filly from the plaintiff at Milwaukee, Wisconsin, on or about August 23, 1913, and thereby agreed to forward and ship the same to the plaintiff at Erie, Pennsylvania, in a safe and proper manner, the said defendant company thereby undertaking to forward said yearling filly as a common carrier to the defendant at Erie, Pennsylvania, whereupon it became and was the duty of the defendant company to forward and ship said yearling filly in a safe and proper manner, and to deliver the same to the plaintiff at Erie, Pennsylvania, the point of destination at a reasonable and proper time in the same good, sound and safe condition that the said yearling filly was in when delivered by the plaintiff to the defendant company at Milwaukee, Wisconsin.

The plaintiff avers that at the time the said mare and yearling filly were delivered to the defendant company at Milwaukee, Wisconsin, the defendant company acknowledged the receipt of said animals and agreed to forward the same for the plaintiff to Erie, Pennsylvania, as a common carrier, and it further agreed that it would forward said mare and said yearling filly to the plaintiff at Erie, Pennsylvania, in a proper manner and deliver the same in a proper condition. Said agreement being in writing, hereto attached and made part hereof, and marked "Exhibit A."

The plaintiff further avers that the defendant company did not forward and ship said yearling filly and deliver the same to the plaintiff at Erie, Pennsylvania, in a safe and proper manner, and did not ship and deliver the said yearling filly to the plaintiff in a proper sound and good condition as it, as a common carrier, was required to do.

The plaintiff further avers that on or about August 25th, 1913, it went to the office of the defendant company at Erie, Pennsylvania, and paid to defendant company the consideration requested by the defendant as its proper charge for shipping said mare and colt from Milwaukee, Wisconsin, to Erie, Pennsylvania, and that the said defendant after receiving said charges from the plaintiff thereupon and there undertook to deliver to the plaintiff the said mare and filly which was then and there in the custody, care and keeping of the defendant as a common carrier. That the said mare being in a suitable and proper condition was accepted by the plaintiff from the defendant company but that the said yearling filly at the time when the defendant company offered to deliver and turn over the same from it, the said defendant, a common carrier, to the plaintiff, was not in a safe, sound and proper condition. The said yearling filly having been seriously injured and damaged while in the custody of the defendant as a common carrier, to such an extent that it was wholly ruined. Its left hip having been broken or dislocated while in the care of the defendant, all of such injuries and damages having been caused by and through the negligence of the defendant.

company on account of the improper and unsafe manner in which said filly had been shipped and kept while in the custody and care of the defendant company as a common carrier.

And the plaintiff further avers that on account of the said injuries so caused to the said yearling filly by and through the negligence of the defendant the said filly became and was of no value whatever to the plaintiff and it thereupon refused to accept the same from the defendant.

The plaintiff further avers that while the said yearling filly was in the possession of the defendant company, as a common carrier, it was kept in an improper, unsafe manner and place by the defendant company, and that on account of the negligence of the defendant company the said yearling filly was injured and damaged to such an extent that it became and was wholly worthless to the plaintiff by reason of which the plaintiff refused to accept the same from the defendant company, and that the plaintiff has been deprived of and lost the total value thereof.

8 That on account of the negligence of the defendant whereby the said yearling filly was injured the plaintiff has been damaged in the sum of Three Thousand Dollars (\$3,000.00) to recover which sum the plaintiff has brought this suit.

JOHN S. RILLING,

*Att'y for Pl'ff.*

9 NOTICE TO SHIPPERS.—The Shipper will value his stock, which valuation will be inserted in the contract, and the charge for carriage and any liability for damage will be based on such valuation.

American Express Company—Limited Liability Live Stock Contract. (6069) July, 1910.

(In Duplicate.)

This Contract, Made at Milwaukee, Wis. this 23 day of Aug. 1913, between American Express Company, of the first part, hereinafter called the Express Company, and W. B. Mitchell, hereinafter called the Shipper, party of the second part.

1. Witnesseth: That the Express Company undertakes to forward to the nearest point to destination reached by it (or if destined to a point beyond its lines, to forward to transfer point convenient to destination, and there deliver to connecting carrier to complete the transportation), the animals hereinafter mentioned, of which the shipper declares himself to be the owner (or duly authorized agent of the owner) to-wit:

(Enter on the following lines, in words, not figures, the number and kind of animals or birds.)

1 Mare 1 Colt (300 lbs) Two; consigned to W. B. Mitchell at Erie, Pa. Erie, Pa. for the sum of Seventy-Five Dollars and No cents, which charge is fixed by and based upon the value of said animals as declared by the Shipper, as hereinafter mentioned.

2. And in consideration of the premises, said parties agree That the shipper, before delivering the said animals to said Express Company, demanded to be advised of the rates to be charged for the carriage of said animals as aforesaid, and thereupon was offered by said Express Company alternative rates proportionate to the value of said animals, such value to be fixed and declared by the shipper, and according to following tariff charges, viz:

Enter below in all cases what the Express charges are or would be at the values specified in Section 3.

3. For horses, Jacks, or Mules of a value not exceeding \$100. each, \$100.00.

For Bulls, Burros, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers or animals not otherwise specified, of a value not exceeding \$50.00 each, \$50.00.

For Cats, Ferrets, Guinea Pigs, Rabbits, Fancy Pigeons or Fan Fowls, or other Live Fowls, Birds or Reptiles, of a value not exceeding \$5.00 each.

For a carload of Horses, Jacks or Mules, of a value not exceeding \$100.00 for each animal.

For a carload of Bulls, Burros, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers or animals not otherwise specified, of a value not exceeding \$50.00 for each animal.

4. And said parties further agree that any excess value declared by the Shipper, over and above the limit of value fixed by the Company's rate, is to be charged for, in addition to the above mentioned charge, according to the following schedule, to-wit:

When the merchandise rate of the company between the points shipment of animals is made is—				The additional charge excess value will be—	
Not over \$2.00 per	100 lbs.	.....	1	%	on excess valuation
over \$2.00 " " "	and not over \$3.00 per	100 lbs. ....	1½%	"	"
" \$3.00 " " "	and not over \$5.00 per	100 lbs. ....	2	%	"
" \$5.00 " " "	.....		2½%	"	"

5. The Shipper, in order to avail himself of said alternative rates, and in consideration thereof, being asked by the Express Company to value said property, now declares the values hereinafter mentioned to be the true values of said animals so to be shipped as follows, to wit:

11 (Number and kind). — — Value each, \$—

(Number and kind) — — Value each, \$—

(Number and kind)— — Value each, \$—

(Shipper must in all cases be required to declare value.)

6. The Shipper agrees that the responsibility of the Express Company shall be that of a forwarder only, and not that of a common carrier, and that the Express Company shall not be liable for the conduct or acts of the animals to themselves or to each other, such as biting, kicking, goring or smothering, nor for any loss or damage arising from the condition of the animals themselves.

which results from their nature or propensities, which risks are assumed by the Shipper. The Shipper hereby releases and discharges the Express Company from all liability for delay, injuries to or loss of said animals from any cause whatever, unless such delay, injury or loss shall be caused by the negligence of the Agents or employes of the Express Company, and in such event the Express Company shall be liable only to the extent of actual damage to the animal or animals injured, which shall in no event exceed the sum herein declared by the Shipper to be the value thereof; and for the purpose of ascertaining or assessing such damage, whether the same be a total or a partial loss, the value of said animals as herein declared by the Shipper shall be conclusively deemed to be the true value thereof.

7. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the said animals, and the same is not paid at once, the Shipper agrees that the Express Company may, at its option, retain said animals with ordinary and reasonable care, at the risk and expense of the Shipper, or may return same to the Shipper, the Shipper to pay charges for transportation both ways and all other expenses, and it is understood that the conditions of this contract shall apply to any such returned shipments.

8. The Shipper agrees to load, trans-ship, and unload said animals at his own risk, and, during the transportation thereof, to unload and load said animals whenever the same may be necessary or required, at his own risk, and to furnish the necessary laborers therefor; and further agrees to cause the necessary attendants to accompany and take charge of said animals, the Express Company furnishing free transportation for the attendants who have signed the Attendant's Contract appended hereto, and also furnishing laborers to assist in loading and unloading said animals at the points of shipment and destination, such attendants and laborers not to be regarded, deemed or taken to be the Agents of the Express Company for any purpose whatever, but, on the contrary, such attendants and laborers shall be deemed and taken to be the Agents of the Shipper.

9. Upon the arrival of said animals at destination, the Shipper or consignee shall forthwith receive said animals and pay the charges due thereon, and if from any cause the Shipper or Consignee shall fail or refuse to duly receive the same and pay any such charge, then the Express Company, or the connecting carrier having said animals in charge may, as the Agent of the Shipper, have said animals put and provided for in some suitable place at the cost and risk of the Shipper or consignee, and at any time or times thereafter may sell the same or any of them, at public or private sale, with or without notice as the said Agent may deem necessary or expedient, and apply the proceeds arising therefrom, or so much as may be needed, for the payment of any freight or charges that may be due, and other necessary and proper costs and expenses.

10. All the stipulations and conditions in this contract shall inure to the benefit and extend to each and every carrier, Railroad

Company, Express Company, forwarder, firm, corporation, or person to whom the Express Company may entrust or deliver said animals for transportation, and shall define and limit the responsibility and liability therefor of any such Company or person for the Acts of their Agents or employees.

11. The Shipper agrees that in no event shall the Express Company be liable for any loss or damage unless the Shipper shall, within thirty days after such loss or damage accrues, give notice in writing of his claim therefor to the Express Company, and that any suit against the Express Company for the recovery of loss or damage to the property herein specified shall be commenced within six months next after such loss or damage shall have accrued, or be forever barred, and should any suit be commenced against the Express Company after the expiration of the said six months, the lapse of time shall be taken as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding, and there shall be no waiver of the aforesaid time within which said claim shall be made, or within which suit shall be commenced, unless the Express Company expressly agrees in writing to waive the same, and the Shipper hereby so expressly stipulates and agrees. It is further agreed that any question arising under this contract shall be determined by the Law of the State of New York.

Signed in duplicate.

AMERICAN EXPRESS COMPANY,

By C. W. TAYLOR, *For Co., Agent.* [SEAL.]  
W. B. MITCHELL.

(Owner or duly authorized Agent of the Owner.)

#### *Attendants' Contract.*

Office ———, State of ———, Date ———, 191—.

Whereas, American Express Company, neither owns, controls, manages, nor in any way directs any railroad or steamboat lines, or any other method or means of transportation, but relies wholly on railroads, steamboats and other means of transportation entirely owned, controlled, managed and directed by other corporations, or by individuals, for the forwarding and transportation of animals, goods and other matter intrusted to it to be forwarded and transported; and

Whereas, the said Express Company has entered into an agreement with ——— to forward the animals named in the foregoing contract, from ——— to ——— in the State of ——— upon the terms and conditions expressed in the preceding pages, and it is necessary under said agreement that the owner or some person, or persons on his behalf, shall accompany and take charge of said animals to said place; and

Whereas, the proprietors or owners of the railroad, steamboat



her lines over which said animals are to be transported will allow any person to accompany the same, except upon the agreement that said Express Company shall hold them harmless from and all liability for injury or loss which said person or persons sustain while so traveling; and

whereas, the individual subscribers hereto, other than the said carrier, with full knowledge of the foregoing facts, are desirous, pursuant to said agreement of the owner, and in his interest, of accompanying said animals to the place to which they are to be forwarded;

now, in consideration that the said Express Company and the proprietors or owners of said railroad, steamboat or other lines allow an attendant or attendants to accompany and ride with said animals and of free transportation procured for him or them for that purpose by said Express Company, over said lines,

it is Agreed, that neither the said Express Company, nor any railroad or steamboat Company or other carrier, on whose line said attendant or attendants shall travel in accompanying said animals, under any circumstances, or in any case whatever, be liable for injury or loss occurring to such attendant or attendants, during transportation, whether such injury or loss happen or arise by any fault, carelessness or negligence, gross or otherwise, on the part of said Express Company, its agent or servants, or of said railroad or steamboat company, its or their agents or servants; it being the intent of this contract that said attendant or attendants shall and will assume all and every risk incident to travel, from whatever cause arising.

In consideration of the premises, and other valuable consideration hereby acknowledged by each of them, the said attendants hereby agree that this agreement shall extend to and inure to the benefit of any railroad or steamboat company, or other carrier, on whose line said attendants, or either of them, may receive injury while so traveling, and said attendants, for themselves, their heirs, executors, and administrators, hereby release and forever discharge said Express Company and such railroad or steamboat company and their carrier, of and from any and all claims, demands, liabilities, actions or suits which against said Express Company or said railroad or steamboat company, or other carrier, they or either of them, their or either of their heirs, executors or administrators shall or may at any time have by reason of any injury to, or loss of their property, or the property of either of them, or injury to their person or the person of either of them, while so accompanying said animals.

And for the consideration aforesaid the said shipper or owner hereby agrees to indemnify, defend, and save harmless, the said Express Company, or any corporation or carrier over whose lines said attendants, or any of them, may be conveyed, from all claims, demands, liabilities, actions or suits for injury or death of said attendants or any of them, whether or not caused by the negligence, gross or otherwise, of the said Express Company, its agents or servants, or of such railroad or steamboat company, or other carrier,



or its or their agents or servants. It is the intention of this agreement that said owner and attendants assume all risk of injury to person or property, incident to the transportation of said animals and attendants from whatever cause arising.

16 It is Further Agreed, that any question arising under this contract shall be determined by the law of the State of New York.

Witness the hands of the parties hereto at the date aforesaid.  
(Signature of owner or duly authorized agent of owner.)

\_\_\_\_\_, [SEAL.]  
\_\_\_\_\_, [SEAL.]  
\_\_\_\_\_, [SEAL.]  
\_\_\_\_\_, [SEAL.]

(The Attendant's Contract must be signed by the Owner (or duly authorized agent of the Owner) and by Each attendant who accompanies the shipment.)

Endorsement: Common Pleas of Erie County—No. 29, May Term, 1914—United States Horse Shoe Company vs. American Express Company—Plaintiff's Statement—Filed Court Common Pleas Erie Co. Pa. Jul- 16 1914—Law Offices of John S. Rilling Erie, Pa.

17 In the Court of Common Pleas of Erie County, Pennsylvania.

No. 29, May Term, 1914.

UNITED STATES HORSE SHOE COMPANY  
VS.  
AMERICAN EXPRESS COMPANY.

*Plea.*

And now, to-wit; July 21st, 1914, comes the defendant by its attorney of record and pleads "Not Guilty."

CHARLES F. PATTERSON,  
*Attorney for Defendant.*

Endorsement: No. 29 May Term 1914—United States Horse Shoe Company vs. American Express Company—Plea—Filed Court Common Pleas Erie Co. Pa. Jul- 22 1914—Charles F. Patterson, 865 Frick Building Annex.

In the Court of Common Pleas of Erie County, Penna.

No. 29, May Term, 1914.

UNITED STATES HORSE SHOE COMPANY

vs.

AMERICAN EXPRESS COMPANY.

*Defendant's Points.*

The defendant respectfully requests the Court to charge the jury as follows.

1. Under all the evidence and the pleadings, the verdict must be for the defendant.

2. The shipment of the mare and colt having been made under a written contract, required by the laws of the United States, and being interstate in character, the plaintiff in no event can recover more than the sum of \$50.00, with lawful interest thereon from the date of the injury, and it is immaterial whether or not the figures of \$50.00 were written in the proper place, in the live stock contract appearing that the expressage charged and paid was based upon a valuation of \$50.00 for the animal carried in accordance with the rates and schedules filed by the defendant company with the Interstate Commerce Commission, and in force and effect at the time the shipment was made.

3. The shipper who was the agent of the plaintiff, and whose contract the plaintiff has adopted, not having at the time of the execution of the live stock contract, declared any value upon the colt in excess of \$50.00 and expressage having been charged and paid for the carriage of the colt, based upon a valuation of that sum, the plaintiff in no event can recover more than \$50.00, with interest thereon. Such sum of \$50.00 being the basis of calculating the charge for the carriage of the colt from Milwaukee, Wis., to Erie, Pa., in accordance with the rates and schedules filed by the defendant company with the Interstate Commerce Commission, in accordance with law, and in force and effect at the time the shipment was made.

4. It was the duty of the plaintiff through its agent Mitchell to declare the value of the colt at the time it was offered for shipment, and he not having declared any value in excess of \$50.00 it is immaterial that the blank spaces provided in the live stock contract for the declaration of value are unfilled, and express charges for the transportation of the colt from Milwaukee, Wis., to Erie, Pa., having been charged and paid upon the basis of \$50.00 as a valuation in accordance with the rates and schedules filed by the defendant company in accordance with law and in force and effect at the time the shipment was made the plaintiff's recovery in any event is limited to the sum of \$50.00 with interest thereon, from the date of the accident.

5. The plaintiff is charged by law with a knowledge of the rates

and schedules of the defendant properly filed with the Interstate Commerce Commission which were in force and effect at the time the transaction took place, so far as they effect the carriage of the animals. The failure of the plaintiff's agent to declare any valuation upon the colt in excess of \$50.00 limits the recovery of the plaintiff in any event to the sum of \$50.00 with interest thereon under the pleadings and all the evidence.

6. The plaintiff must show by the fair weight of the evidence that the injury suffered by the colt was due to the negligence of the defendant, and if the injury suffered was caused by any action of the animal itself, due to its natural propensities and not to the negligence of the defendant, then the verdict of the jury must be for the defendant.

Respectfully Submitted.

CHARLES F. PATTERSON,

*Attorney for Defendant.*

Erie, Pa., Feb'y 5, 1915.

Endorsement: Number 29, May Term, 1914—United States Horse Shoe Co., vs. American Express Company—Defendant's Points—Filed Court Common Pleas Erie Co. Feb. 5 1915—Charles F. Patterson, Pro. Defendant.

21 In the Court of Common Pleas of Erie County, Pa., May Term, 1914.

No. 29.

In the Issue Joined Between

UNITED STATES HORSE SHOE COMPANY, Plaintiff,

vs.

AMERICAN EXPRESS COMPANY, Defendant

We, the jury empanelled and sworn to try the issue joined in this case, do find for the *for the* Plaintiff for the sum of \$1,913.70.

WM. EWERS, *Foreman.*

Date, February, 1915.

Endorsement: No. 29 May Term 1914—United States Horse Shoe Company vs. American Express Company—Verdict of the Jury at February Term 1915—Filed Court Common Pleas Erie Co. Feb. 6 1915.

In the Court of Common Pleas of the County of Erie, State  
of Pennsylvania, May Term, 1914.

No. 29.

UNITED STATES HORSE SHOE CO.

vs.

AMERICAN EXPRESS CO.

No. —, — Term, 191—.

*Plaintiff's Bill of Costs.*

A. McElroy, 4 days, \$6.00; miles travel, @6¢....	Total, \$6.00
B. Mitchell, 4 days, \$6.00; 400 miles travel, @ 6¢	
24.00 .....	Total, \$30.00
M. Cook, 3 days, \$4.50; miles travel, @6¢.....	Total, \$4.50
Thomas Pierce, 3 days, \$4.50; miles travel, @6¢..	Total, \$4.50
W. Merell, 3 days, \$4.50; miles travel, @6¢.....	Total, \$4.50
J. C. Elviage, 3 days, \$4.50; miles travel, @6¢..	Total, \$4.50
C. Hull, 3 days, \$4.50; miles travel, @6¢.....	Total, \$7.80
H. Seefeld, 4 days, \$6.00; 30 miles travel, @6¢	
1.80 .....	Total, \$7.80
—, — days, \$—; miles travel, @6¢.....	Total, \$.....
—, — days, \$—; miles travel, @6¢.....	Total, \$.....
—, — days, \$—; miles travel, @6¢.....	Total, \$.....
—, — days, \$—; miles travel, @6¢.....	Total, \$.....
—, — days, \$—; miles travel, @6¢.....	Total, \$.....
—, — days, \$—; miles travel, @6¢.....	Total, \$.....
Prothonotary's Fees for certifying bill.....	.25¢
Whole amount of bill.....	\$69.85
	69 85

COMMONWEALTH OF PENNSYLVANIA,  
County of Erie, ss:

L. A. McElroy being duly sworn, deposes and says that the foregoing bill of costs is true and correct, that the above named witnesses are in attendance the number of days and traveled the number of miles above stated and were material to the trial of the said case.

L. A. McELROY.

Sworn and subscribed before me this 15th day of February 1915.  
[SEAL.] WILLIAM E. HIRT,

Notary Public.

Commission expires February 21st, 1915.

Endorsement: No. 29, May Term 1914—United States Horse  
shoe Co. vs. American Express Co.—Plaintiff's Bill of Costs Filed —  
9, \$69.85—69.85—Filed Court Common Pleas, Erie Co., Feb. 15,  
1915.

## 24 Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, by Fred S. Axtell, its Vice-President, and Wm. R. Bishop its Assistant Secretary, in pursuance of authority granted by Section 3, Article VI, of the By-Laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint V-L. P. Shriver, John W. Thompson, Joseph H. Cullen and Charles F. Patterson, all of the City of Pittsburgh, County of Allegheny, State of Pennsylvania, each, its true and lawful agent and attorney-in-fact, to make, execute, seal and deliver for and on its behalf, as security, and as its act and deed all bonds or undertakings, authorized by the laws of the State of Pennsylvania, requiring the approval of any Court in said State of Pennsylvania or Judge thereof, or the clerk or other officer empowered by law to approve such bonds; also bonds required by Order or Decree of the United States Courts for said State, and for Trustees and Receivers in Bankruptcy proceedings under the Bankrupt Act of the United States. It being understood that this authority does not include bonds required of Public Officers.

Also, bonds guaranteeing contracts for the erection of public or private buildings and improvements, contracts for public or private work, and contracts for supplies.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons. This power of attorney revokes that issued November 9th, 1912, in behalf of V-L. P. Shriver, John W. Thompson and Robert A. Dobbin, Jr.

In witness whereof, the said Fred S. Axtell, Vice-President and Wm. R. Bishop Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 5th day of June A. D. 1913.

FRED S. AXTELL,  
*Vice-President.*

Attest:

W. M. BISHOP,  
*Assistant Secretary.*

STATE OF MARYLAND,  
*City of Baltimore, ss:*

On this 5th day of June, A. D. 1913, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified came Fred S. Axtell, Vice-President, and Wm. R. Bishop, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be

the individuals and officers described in, and who executed, the preceding instrument, and, they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself depose and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and  
25      affixed my Official Seal, at the City of Baltimore, the day  
         and year first above written.

[SEAL.]

MILLARD LEONARD,  
*Notary Public.*

Commission expires May 4, 1914.

Extract from By-Laws of the Fidelity and Deposit Company of Maryland, Adopted by the Stockholders of said Company on January 14th, 1913.

“Article VI, Section 3.—The President, or any of the Vice-Presidents, elected by ballot from the members of the Board of Directors shall have power by and with the concurrence of the Secretary or any of the Assistant Secretaries, to appoint my attorney-in-fact or to authorize any person or persons to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, agreements and policies, and to affix the seal of the Company thereto.”

I, Wm. R. Bishop, Assistant Secretary of the Fidelity and Deposit Company of Maryland, hereby certify that the foregoing is a true copy of Section 3, Article VI, of the By-Laws of Said Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland, this 5th day of June, A. D. 1913.

[SEAL.]

W. R. BISHOP,  
*Assistant Secretary.*

26 In the Court of Common Pleas No. for the County of Erie,  
State of Pennsylvania.

No. 29, May Term, 1914.

UNITED STATES HORSE SHOE COMPANY  
vs.  
AMERICAN EXPRESS COMPANY.

Appeal of American Express Company from the Judgment of Said  
Court.

Know all men by these presents, That we, American Express Company and Fidelity & Deposit Company of Maryland, are held and firmly bound unto the Commonwealth of Pennsylvania, to the use of all parties interested, in the sum of Four Thousand (\$4,000.00) dollars, lawful money of the United States, to be paid to the said Commonwealth, to the use of the party or parties entitled thereto or their certain executors, administrators or assigns, being double the amount of said order, judgment or decree, and all costs accrued and likely to accrue, to which payment, well and truly to be made and done, we do bind ourselves, our heirs, executors and administrators, and every — of them, firmly by these presents.

Sealed with our seals and dated this — day of February, A. D. 1915.

Whereas, American Express Company has appealed to the Supreme Court of Pennsylvania from the judgment of the Court of Common Pleas, of the County of Erie in the above stated suit or proceeding:

Now the condition of this obligation is such, that if the said Appellant will prosecute this Appeal with effect, and will pay all costs and damages awarded by the Appellate Court, or legally chargeable against it, then this obligation to be void; otherwise to remain in full force and virtue.

AMERICAN EXPRESS CO.,  
By J. P. BRADLEY, *Gen. Ag't.* [L. s.]  
FIDELITY & DEPOSIT COMPANY OF  
MARYLAND, [L. s.]  
By JAS. H. CULLEN,  
*Agent and Attorney-in-Fact.*

Signed, sealed and delivered in the presence of—  
L. WINDLERY.

Endorsement: No. 29, May Term, 1914—United States Horse Shoe Company vs. American Express Company—Bond—(Under Sections 6 and 13, Act 1897.)—Filed Feb'y 26, 1915—Bond on Appeal—to the Supreme Court of Penn'a.—Filed Court of Common Pleas Erie Co., Feb. 25, 1915.

28 In the Court of Common Pleas of Erie County, Pa.

No. 29, May Term, 1914.

UNITED STATES HORSE SHOE COMPANY  
vs.  
AMERICAN EXPRESS COMPANY.

And now, to-wit, February 15th, 1915, comes the plaintiff by attorney, and moves the Court to make an order to have the stenographer transcribe and file the notes of testimony taken in the above stated case.

JOHN S. RILLING,  
*Attorney for Plaintiff.*

Endorsement: In the Court of Common Pleas of Erie County, Pa. No. 29, May Term 1914—United Horse Shoe Company vs. American Express Company. Motion. Feb'y 26, 1915. Motion granted Per Curiam W.—Law Offices of John S. Rilling, Erie, Pa.

29 COMMONWEALTH OF PENNSYLVANIA,  
*County of Erie, ss:*

I, H. L. Brevillier, Prothonotary of the Court of Common Pleas in and for said County, do hereby certify that the above and foregoing is a true and correct exemplification of the record in the foregoing stated case, as full and entire as the same appears on file and of record in said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at Erie, Pa., this 17<sup>th</sup> day of April A. D. 1915.

[SEAL.]

H. L. BREVILLIER,  
*Prothonotary.*

I, Emory A. Walling, President Judge of the Sixth Judicial District, composed of the County of Erie, do certify that H. L. Brevillier, by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name, and affixed the seal of the Court of Common Pleas of said County, was at the time of so doing, and now is, Prothonotary in and for said County of Erie, in the Commonwealth of Pennsylvania, duly commissioned and qualified, to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that the said record, certificate and attestation are in due form of law, and made by the proper officer.

EMORY A. WALLING,  
*President Judge.*



COMMONWEALTH OF PENNSYLVANIA,  
*County of Erie, ss:*

I, H. L. Brevillier, Prothonotary of the Court of Common Pleas in and for said County, do certify that the Honorable Emory A. Walling, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof and still is, President Judge of the Court of Common Pleas, Orphans Court, and Court of Quarter Sessions of the Peace in and for said County, duly commissioned and qualified, to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 17th day of April A. D. 1915.

[SEAL.]

H. L. BREVILLIER,  
*Prothonotary.*

30

*Index.*

Plff's Witnesses:

Def't's Witnesses:

L. A. McElroy .....	3, 103	L. L. Clark .....	79
W. B. Mitchell .....	27, 65, 117	Gus Eicher .....	85
Dr. J. C. Elviage .....	48	W. M. Giffin .....	93, 122
T. H. Seefelt .....	50, 119	J. J. Rose .....	104
E. W. Merrill .....	66	Geo. T. Carlin .....	108
F. M. Cook .....	70	Charge to the jury .....	123
Thorn Pierce .....	75, 116		

31

No. 29, May Term, 1914.

UNITED STATES HORSE SHOE COMPANY  
 vs.  
 AMERICAN EXPRESS COMPANY.

Tried before Hon. Paul A. Benson and a jury, at Erie, Pa., February 4th, 1915.

Jno. S. Rilling, W. Pitt Gifford and C. Arthur Blass for the plaintiff.

Charles F. Patterson for the defendant.

32

Counsel for plaintiff in his opening address to the jury having stated to the jury that the value of the colt in controversy was between three and five thousand dollars (in a negligence case asking for unliquidated damages) defendant's counsel moves to withdraw a juror and continue the case.

Motion refused and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

L. A. McELROY sworn and examined by Mr. Rilling testified as follows:

Q. What is your name?

A. L. A. McElroy.

Q. Where do you live?

A. In Erie.

Q. What is your business?

A. President of the United States Horse-Shoe Company.

Q. Where is your plant located?

A. On the East Lake—Road.

Q. State whether it is an extensive and large plant, or not?

Objected to as immaterial and irrelevant.

33 Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

A. Our plant is considered a large plant. Our business is conducted all over the United States:—and in South Africa and the Philippine Islands—

Objected to:

Q. State what you are doing to advertise the out-put of your Mill: in regard to the owning of fine race-horses?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

A. In order to advertise our shoes among the horsemen, over the United States, the Company some years ago decided to own a stable of race horses, and exhibit them at the various Fairs &c., over the country: having, in an exhibition tent, a full and complete line of our shoes displayed on a sample-board:—and to make our tent the headquarters for horse men visiting the various Fairs &c.

Q. What was the character of the horses you acquired and used for that purpose?

Objected to as incompetent, irrelevant and immaterial.

34 Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

A. In order that our horses might attract attention, and be able to win the prizes and purses for which they competed it was necessary to acquire the best and most highly-bred animals we could acquire.

Q. In order to carry out that policy state what you did about acquiring the animal for which this suit is brought?

Objected to.

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

A. In 1910, having found a mare bred in proper lines, in foal a stallion we decided that this combination offered the best possible speed-combination: We therefore bought the mare, with the idea of producing a colt that we could develop into a sensational racing horse:

Objected to by defendant, and defendant's counsel moves to strike out the answer as not responsive to the question, and that the witness is expressing an opinion.

Objection overruled and exception sealed for the defendant.  
PAUL A. BENSON, J. [SEAL.]

Q. State your experience in connection with horses of this kind?

35 A. I have been acquainted with horses all my life.

Q. What experience and knowledge have you of race horses and horses of this kind, or mares and colts?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled and exception sealed for the defendant.  
PAUL A. BENSON, J. [SEAL.]

A. My experience is that it is very difficult——

Objected to.

Q. How extensive has been your experience and knowledge regarding to race horses &c.?

A. I have been acquainted with race horses since I was fifteen years old.

Q. Now state when this colt was born?

Mr. Patterson:

Q. Do you know this of your own knowledge?

A. I wasn't there when she was foaled.

Mr. Rilling:

Q. Do you know about when?

A. I received a telegram advising me that the colt was foaled on the 25th of May 1912.

Q. State what the pedigree of this colt is, so far as you can know

36 Objected to as immaterial, and that the witness has shown no knowledge on the question.

Objection overruled and exception sealed for the defendant.  
PAUL A. BENSON, J. [SEAL.]

(Paper shown to the witness.)

A. The filly in question was sired by Baron Chelsea, he by Oakland Baron, a record of 2-9¼ and the sire of forty five colts with records of 2-6¾ to 2-20: Oakland Baron was sired by Baron Wilkes, sire of a hundred and forty five colts with high records: He by George Wilkes, and he by old Hambletonian 10:

Her dam, Saponia, was sired by Sphinx, by Electioneer: The second dam was Bertha D., by Durango:

We could go on at length, but it is all registered with the American Trotting Association.

37 Q. How long did you keep this colt in Wisconsin?

A. I left the mare there prior to the time the colt was foaled and about fifteen months after that, until the 23rd or 24th of August 1913.

Q. What did you do with the colt? In whose possession was the colt?

A. The mare and colt were in the possession of Mr. Seefelt the owner of Baron Chelsea, who took charge of the mare. After the colt was foaled both mare and colt were turned over to the care of Mr. George Weber: They were kept there until I sent Mr. Mitchell to bring them to Erie.

Q. Who is Mr. Mitchell?

A. A man I employed to go there and accompany the horse from there to Erie: I sent him about the 20th of August 1913.

Q. When did the mare and colt arrive at Erie?

A. To the best of my knowledge on Sunday——

Q. Who were they brought here by?

A. The American Express Company.

Q. When did you go to get them?

A. Monday forenoon August 25th.

Q. Who went with you?

A. Mr. Mitchell, Mr. ———, Mr. Fletcher the Secretary of the Company and a representative of the Express Company.

38 Q. Where did you find them?

A. We found the mare and colt in a dark basement in a stable known as the Woods barn: between 15th and 16th streets and between Peach and Sassafras:

Q. When you got to the cellar what happened there?

A. I went to take delivery of the animals—the representative of the Express Company led out the mare from the dark basement:

Q. What kind of an entrance was there to the basement?

Objected to as incompetent, irrelevant and immaterial under the pleadings:

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

A. There was a run-way leading into the basement:

Q. What took place?

A. They led the mare out: She seemed to be all right: Then the representative of the Express Company brought out the colt: She came on three legs: I saw she was seriously injured, and refused to accept her. Her left hip was broken and her whirlbone broken:

Q. How did this injury affect the value of the colt?

A. It destroyed its value.

Objected to as immaterial and incompetent.

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

39 Q. What did you do about accepting the colt?

A. I refused to accept her.

Q. What kind of a place was this where the colt was kept?

Objected to.

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

A. It was a very dark, low basement.

Q. How far could you see when you got down into it?

A. Not very far.

Q. When did you see that place again, after the 25th of August?

A. About the 20th of October.

Q. What was the condition then as compared with the 25th of August?

Objected to as too remote: and as incompetent irrelevant and immaterial.

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

A. So far as I could see it was in the same condition that it was in in August.

Q. Now explain how this barn was: what this basement consisted of, after you got into it, on the 25th of August?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled and exception sealed for the defendant.

40

ant.

PAUL A. BENSON, J. [SEAL.]

A. The place where the horses were kept was a portion of the basement of the barn: and he entered by going down through this run-way and turning to the left through three or four single stalls, very roughly constructed, and beyond that what had apparently been a box stall: It was a very dark place and no windows in there.

Q. What was the manner of its construction?

A. Rough boards and stalls.

Q. Do you know in which stall the colt and mare had been put?

A. No sir.

Q. From your examination—what is your knowledge and experience regarding the raising of colts: have you had any experience as to the nature and habits of colts?

Objected to as irrelevant.

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

I have raised a good many colts.

State whether in your opinion the place you have testified here this colt and mare were put was a reasonably safe and proper place to put a mare and colt of this kind, or not?

Objected to, as incompetent and irrelevant under the pleadings.

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

In my opinion it was not.

State whether or not this injury to this colt, as testified to by you, was the probable or the natural result of putting this mare and colt in such a place as that?

Objected to, and objection sustained.

Had the Express Company ever offered to deliver this mare and colt to you before you were there on this Monday?

No sir.

Now I wish you would state to the Court what, in your opinion, would you say was the fair value of this colt?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

Based on the prices I paid for other horses, and asked me for other fillies since that time, I would place a value of Three Thousand dollars on this filly.

Deft's counsel moves to strike the answer from the Record.

Motion overruled and exception sealed for the defendant.

PAUL A. BENSON, J. [SEAL.]

It is very difficult to find animals bred in exactly the Line that have produced our most sensational race horses:

Deft's counsel moves to strike the answer from the Record, as unresponsive to the question.

The Court: We will put in a general refusal to your motions.

Adjourned until two P. M.

Afternoon Session.

LEWIS A. McELROY, recalled, cross-examined by Mr. Patterson, testified as follows:

You saw this colt on the 25th of August 1913?

Yes sir.

In the morning, or was it in the afternoon?

It was about 11 o'clock in the morning.

When did you next see it?

A. I saw it four or five days after that, in Dr. Mitchell's hospital.

Q. Did you see it after that?

A. On the 20th of October.

Q. Then you have seen it twice since the accident?

A. Yes sir.

Q. When did you see it before the 25th of August 1913?

A. I never saw it before that.

Q. Your knowledge then as to the pedigree of the colt is entirely based upon what you heard from other people?

A. It is based on the records.

Q. Those records you did not make yourself?

A. No.

Q. They were made by other people?

A. Yes sir.

Q. All you know about the pedigree is based upon records made by other people?

44 A. Yes sir.

Q. And you never saw the colt before that time?

A. No sir.

Q. How much did the colt weigh?

A. About 700 pounds.

Q. On what date? When you first saw it?

A. Yes sir.

Q. Is that an estimate that you make about the weight?

A. That is my opinion of its weight.

Q. And it was about a year and a quarter old at this time?

A. Yes sir.

Q. As a matter of fact didn't it weight about 300 pounds?

A. There is no matter of fact about it. I told you my opinion.

Q. How much did the mare weigh?

A. About 1050 pounds.

Q. How much larger was the mare than the colt?

A. A great deal larger.

Q. Was she twice as large as the colt?

A. I didn't measure them.

Q. Give me your estimate.

A. I gave you the weight.

Q. Did you go into the stable on August 25th?

A. Yes sir.

Q. How far did you go in?

45 A. Back of the stalls.

Q. You went in and made a cursory look around I suppose?

A. Yes sir.

Q. Was there an electric light in there when you went in?

A. There was a bulb there, but it was not lit.

Q. You don't know whether it had been lighted the night before?

A. No.

Q. Did you make any physical examination of the colt yourself?

A. Yes sir.

Q. What did you do?

- A. I convinced myself that the horse was seriously injured and sent for Dr. Elviage.
- Q. What did you do to determine that the hip was broken?
- A. Felt of it.
- Q. What part of the hip was broken?
- A. The point of the hip.
- Q. What bone?
- A. I am not prepared to say what bone was broken.
- Q. You don't know what bone?
- A. No. The hip bone.
- Q. What part of the hip bone was broken?
- A. My opinion was the top part—the point of the hip bone.
- Q. Did you walk the colt at all up and down?
- A. Yes sir.
- Q. Was it lame?
- A. Yes sir.
- Q. How lame?
- A. Very lame.
- Q. Was it immediately noticeable?
- A. Yes sir.
- Q. Did the horse have any wabbling motion of the hind quarters?
- A. When he went out he barely touched his left hind foot to the ground.
- Q. Did you walk him up and down the street?
- A. No. Not until he was taken to the hospital.
- Q. Was he taken to the hospital at once?
- A. After Mitchell made the examination.
- Q. Did you see the colt taken over?
- A. I led the mare over and Mitchell took the filly.
- Q. And the lameness of the colt was very noticeable?
- A. Yes.
- Q. When did you first hear the colt was in Erie?
- A. Sunday afternoon.
- Q. How did you hear it?
- A. I received a telegram from Mitchell that he expected to arrive in Erie.
- Q. Did he telephone to you when he came here?
- A. Not that I remember of.
- Q. Did he telephone to you on Sunday morning when he arrived at he was here?
- A. Not that I remember of.
- Q. Did anybody telephone you that day?
- A. Not that I remember of.
- Q. Do you recall that one of the express company's agents telephoned over to you and said the car was here and asked you what the express company should do with it?
- A. No sir. As a matter of fact on the receipt of Mr. Mitchell's telegram from Cleveland advising me that he would be here, being out in the country I telephoned to the express agent at Erie telling



him that I had received this telegram and could not take delivery of the horses on Sunday, but would take delivery on Monday morning.

Q. You had a conversation with the express man?

A. Yes sir.

Q. Did you say to put the colt in the stable till the next day?

A. No sir. I told him to take care of it.

Q. Do you remember those exact words?

A. No.

48 Q. Is it possible that you said to the expressman who telephoned to you that he should put the colt in the stable till the next day?

A. It is not possible. I only told him that I could not take delivery on Sunday, but would take delivery of them on Monday morning.

Q. When you heard next morning that the horse was in town, did you learn that at your office or where?

A. I met Mr. Mitchell Sunday evening.

Q. After the colt had arrived?

A. Yes sir.

Q. He told you the colt was in town?

A. Yes sir.

Q. The Monday morning that you went to take delivery of the colt you signed a shipping receipt for the mare and colt?

A. I stopped at the station and signed a receipt for the mare and the filly, yes sir.

A book is marked Exhibit A for identification being a receipt book of the American Express Co. under date of August 25, 1913.

Q. I show you this book marked Exhibit A and ask you whether the words W. B. Mitchell per L. A. M. opposite "and delivery of a colt and horse from Milwaukee, Wis., to W. B. Mitchell, Erie, Pa.," is in your handwriting?

49 A. Yes sir.

Mr. Patterson: As part of the cross-examination of the defendant I offer this Exhibit A, showing receipt of the colt and horse on that date.

Q. That was before you had seen the colt at all?

A. Yes sir. And after seeing the colt I told Mr. Clark, who was present.

Q. And from there you went over to the stable?

A. Yes sir.

Q. This colt was utterly untrained at the time the accident occurred?

A. So far as being trained for speed.

Q. It was an ordinary colt about a year and a quarter old—I mean outside of the pedigree?

A. Not outside of its pedigree—outside of its pedigree and individuality. It had never been trained.

Q. It had never been trained for any racing of any kind?

A. Not up to this time; it was brought here for that purpose.

Q. How long does it take to train colts of this character for racing purposes?

A. Usually about six months.

Q. At what age can you use young animals of this kind for racing purposes?

A. They have been raced as young as yearlings, but not very many yearlings. A great many two and three years old.

Q. Usually animals are not raced much before they are two or three years old?

A. Not raced much as yearlings. But there are a good many two or three years old.

Q. Before any colt can be used as a racing horse it is subjected to long course of training and treatment?

A. That depends on your definition of "course."

Q. It is subjected to a course of training in the hands of competent people?

A. Yes.

Q. And the practice is to put it in the hands of a competent trainer and he turns it out in accordance with his ideas?

A. Yes.

Q. How long does that usually take?

A. Four to six months.

Q. Sometimes a year; sometimes longer?

A. No, not ordinarily.

Q. That is an expensive proceeding?

A. Somewhat, yes.

Q. And until that is done and until the horse is developed nobody can tell whether a colt is going to be a good race horse or not, can they?

A. It is more or less of a problem.

Q. It is very problematic, no matter what breeding a horse may have, what each individual animal may develop into?

A. Ordinarily an animal bred along the lines that this filly was bred, of good individuality, has promise of being a very good race horse, barring accidents and other things of that kind.

Q. But nobody can tell until the horse has been trained and tried out?

A. No sir.

Q. It is entirely problematic?

A. Yes sir.

Q. Almost guess work?

A. If you choose to call it so.

Q. And it is a fact that some of the very best bred colts don't turn out to be great performers? That is true, is it not?

A. For various reasons, yes.

Q. And a wonderful stallion might have four or five hundred get and out of them all very few might turn out to be speedy race horses?

A. That is not the case. Baron Wilkes had 145 with marks of  $\frac{3}{4}$  to 30.

Q. How many get in the aggregate?

52 A. That I am not prepared to say.

Q. Might have a thousand?

A. Hardly.

Q. Might they have 750?

A. It is very doubtful.

Q. I am asking whether 750 of the get of such an animal would be a fair estimate of such number.

A. I would think that would greatly exceed the number. I think the year books will show that ninety per cent of Oakland Baron's get were very fast animals.

Mr. Patterson: I ask that the last part of the answer be stricken out as not responsive.

Request refused and exception sealed for defendant.

Q. All the information that you have as to the number of horses, the get of these sires, is entirely based upon information that you have received from others—almost altogether?

A. It is based upon the records.

Q. The records you know nothing personally about?

A. I know there is a registered association.

Q. I am asking whether or not you know from personal knowledge the number of horses which are the get of the sires of whom you have spoken, or is it information acquired from year  
53 books and information you have acquired?

A. It is the information of the record of the American Trotting Association.

Q. It is not your personal knowledge?

A. It is information compiled by this association, tables from year to year, and is considered standard by the breeders of the country.

Q. Which you have read?

A. Yes.

Q. Did you ever buy a colt of this age before?

A. Not that I remember of.

Q. Did you ever deal in a colt of this age before? With this breeding?

A. Not bred like that, no sir.

Q. You are engaged yourself in the horseshoe business?

A. I am an officer of the company.

Q. You are president of the United States Horseshoe Company?

A. Yes sir.

Mr. Patterson: In view of the cross-examination of the witness I move to strike from the record all the statements of the witness as to the value of the horse, and all the statements of the witness as to the pedigree and its breeding.  
54

Motion overruled and exception sealed for the defendant.

Redirect examination by Mr. Rilling:

Q. Who was it you sent after this filly to Milwaukee?

A. Mr. W. B. Mitchell.

Q. Whose agent was he?

A. The agent of the Horseshoe Co.

Q. You stated that you telephoned to the Express Co. on Sunday that you could not take delivery until the next Monday. What reply was made to that?

A. I telephoned them as a matter of courtesy, so they could know where they were at. That was before the horses arrived at Erie. I told them I had received a telegram from Mr. Mitchell that they were on their way and probably would arrive on Sunday, but, being out in the country, I would not be able to take delivery of the horses until Monday morning; and my recollection of the reply is that that would be all right.

Q. In your cross-examination you referred to Mr. Clark. Who is Mr. Clark?

A. Agent of the American Express Co.

Q. At Erie?

A. Yes sir.

55 Q. You say you receipted for these animals in the manner shown by this Exhibit, before you saw them?

A. Yes sir.

Q. And, when interrupted, you were about to state what you said to Mr. Clark about this colt?

A. After I found the condition that the colt was in, I said to Mr. Clark at the stable—we were all there—that it would be necessary to erase my signature from the receipt, and Mr. Clark stated that that was not necessary, that they would not take any advantage of my having signed for the horses before I knew they were all right. On the strength of that I let it go at that.

By Mr. Patterson:

Q. Were these horses consigned to you as an individual or to the United States Horseshoe Co.?

A. They were consigned to W. B. Mitchell.

Q. Who was the man traveling from Milwaukee to Erie?

A. Yes sir.

Q. And he was your agent in the transaction?

A. Yes sir.

Q. Properly authorized in the premises?

A. Yes sir.

56 W. B. MITCHELL, sworn, examined by Mr. Rilling, testified as follows:

Q. Your name is W. B. Mitchell?

A. Yes sir.

Q. Where do you live?

A. Rossville, Md.

Q. What is your business?

A. Horse trainer.

Q. How long have you been engaged in that business?

A. All my life.

Q. You heard Mr. McElroy's testimony here?

A. Yes sir.

Q. When was it you went to Milwaukee?

A. I think the 22d of August Mr. McElroy employed me to go up to Milwaukee from Cleveland and get the mare and colt. I was at Cleveland.

Q. Who were you acting for?

A. For the United States Horseshoe Co.

Q. When you got to Milwaukee what did you do?

A. I had a letter of introduction to Mr. Seefelt first and I looked him up; and went to the American Express office about shipping them home the same evening.

Q. You went to the office of the Express Co. in Milwaukee?

A. Yes sir.

57 Q. Who went with you?

A. Mr. Seefelt.

Q. Was he there all the time when you went to the office?

A. Yes sir, until I left.

Q. What did you do at the office of the American Express Co.?

Objected to as incompetent, there being a written contract in the matter.

Objection overruled, and exception sealed for the defendant.

Q. What did you do there in connection with having this mare and colt shipped to Erie?

A. We went there to see the agent and get the rate on the mare and colt from there to Erie by express.

Q. What was done?

A. He said the rate would be \$75.00 on the two.

Q. What else was done there?

A. Then we went out in the country. I forget the name of the place.

Q. How did you happen to go out in the country?

A. The mare and colt was out there.

Q. Where did you go?

A. Went for the mare and colt.

Q. What directions did you receive from the Express Co. regarding shipment of the mare and colt?

58 A. They said they would ship them that evening; that the car would be all ready when we got back, which it was.

Q. Did they tell you where the car would be?

A. Yes; at the Northwestern Depot.

Q. What did you do then with the mare and colt?

A. When we got there they had them loaded in the car.

Q. You state you went out to where and brought them in?

A. Two men brought them in, one with each one.

Q. Who went out with you?

A. Mr. Seefelt; in the machine.

Q. They were led in by two gentlemen?

A. Yes sir.

Q. Did you see them in the car?

A. Yes.

Q. What condition were they in?

A. Seemed to be all right.

Q. What did you then do?

A. Went to the office and signed the receipt. Mr. Seefelt was with me when I went in.

Paper marked Exhibit B shown witness.

Q. I wish you would look at that paper and state what that paper is?

A. It is a receipt for the shipment.

59 Q. Is that the paper that you signed at the Express office?

A. Yes sir.

Q. After this paper was signed what did you do?

A. The agent handed it to me. I put it in my pocket and got on the train and went to Chicago.

Q. I wish you to state to the court and jury what if anything was asked of you at either of these two places or offices of the express company as to the value of this mare and colt?

A. Nothing.

Objected to as immaterial and irrelevant under the pleadings and the act of congress governing the case.

The Court: The question is already answered. He said "nothing."

Q. State what if any statement you made to either of the agents of the Express Co. in Milwaukee that you visited, the one you went to in the morning and the one you went to after the car was loaded, where you signed this bill of lading, in regard to the value of these two animals?

Objected to as immaterial and irrelevant.

Objection overruled and exception sealed for the defendant.

A. There was nothing said whatever. It was not asked, and I didn't mention it.

60 Q. After the horse was in the car and you had signed the bill of lading, what was done then?

A. I took the bill of lading, got on the train and came to Chicago.

Q. Who paid your fare?

A. I paid my own fare. The Horseshoe Co. paid my expenses.

Q. You paid your fare with money furnished by the Horseshoe Company?

A. Yes.

Q. What did you do when you got to Chicago?

A. They wouldn't let me ride from Milwaukee to Chicago with them. At Chicago I got in with the horses, so I wouldn't get lost with them. The Express Co. had their men unload them at Chicago.

Q. At what depot?

A. I think it is the Northwestern.

Q. What was it you said they did when they got to Chicago?

A. They unloaded them off of the train that brought them from Milwaukee and led them across town to another railroad.

Q. Who did that?

A. The Express Co.

Q. Where were you?

61 A. I rode on the wagon following them along.

Q. Where did they take them to?

A. To another railroad—Lake Shore I suppose.

Q. What was done with them?

A. I rode all the way from there to Erie in the same car with them.

Q. What time did you get to Erie?

A. About noon Sunday.

Q. What was done with the horses when you got here?

A. I telegraphed Mr. McElroy from Cleveland, and when I got here they unloaded here and put them in the stable.

Q. Who?

A. The Express Co.

Q. What if anything did you have to do with unloading them?

A. I never touched them.

Q. Where did they take them?

A. Took them to a stable up street here.

Q. What if any suggestion did you make about where they were to be taken to?

A. None whatever, because I didn't know one place from another in Erie.

Q. Did you see them put them in the barn?

A. Yes sir.

Q. What kind of a place?

62 A. Very dark low basement.

Q. How was the entrance into it?

A. Steep incline; it looked like into the cellar.

Q. When did you see the mare and colt after that?

A. On Monday morning.

Q. Who did you go there with?

A. Mr. Howell, Mr. McElroy and Mr. Fletcher.

Q. What was the condition of the colt when you next saw it?

A. Very lame. Hip broken or dislocated in some way.

Q. Where was it when you first saw it on Monday?

A. I couldn't see it; it was too dark to see it in fact.

Q. What was done with the colt in the barn?

A. Put it back in the stall.

Q. I mean before that. Did they bring it out?

A. They brought the mare our first and then the colt. The mare seemed to be all right.

Q. Where did they bring the colt from?

A. Way back; next to the open box stall in there.

Q. How was this place as to its elevation?

A. It was below the street.

Q. What kind of a place did they lead the colt up from?

A. It was an incline made for that purpose.

Q. How did the colt walk?

A. He walked on three legs.

63 Q. Did you see the condition of that basement at that time?

A. Yes sir; in a way.

Q. Did you go into the basement?

A. Yes sir. I didn't go there for that purpose.

Q. You saw its condition there?

A. Yes sir.

Q. What was the condition of that place that you saw there that day?

A. Very rough floor, like a board had been broken out—three inch plank; a broken place in the floor.

Q. What would you say as to the condition of the floor, as to whether rough or smooth?

Objected to unless the witness knows.

The Court: I take it the witness won't testify to anything he didn't see. (To the witness.) You understand that you must not testify to what anybody told you.

Q. What stall in this stable was this colt placed in?

A. I think the third stall from the end—right next to the box stall.

Q. Where was this hole in the floor?

A. Between the first stall and the third one.

Q. In order to get to its stall it had to pass over this hole?

64 A. Yes sir.

Q. What experience have you had in the raising of colts?

A. I haven't had very much in raising colts.

Q. What would you say as to this place where this mare and colt was put in there being a reasonable and proper place in which to put a mare and colt like this?

Objected to as immaterial and irrelevant under the pleadings, and further because the witness is not qualified to answer this question.

Objection overruled and exception sealed for the defendant.

A. I would say it would be a very, very unsafe place.

Q. State whether or not this injury to this colt, as testified to by you, was the probable result of having been put in this particular place?

Objected to as leading, immaterial and irrelevant, and because the witness is not qualified to answer the question.

Question withdrawn.

Q. What is your opinion as to this injury to this colt being the probable result of its having been placed in this particular place?

Objected to as leading, immaterial, and irrelevant and because the witness has not qualified to answer this question.

65 The Court: The question is not leading, but I don't think you can prove a negligent act in that way.



Q. What in your opinion was the result of this injury to colt, so far as its value is concerned?

Objected to as immaterial.

The Court: I don't know as it is necessary to call for his opinion. He ought to have knowledge.

Q. What was the effect on the value of the colt?

Objected to, the witness not being qualified.

Objection overruled.

A. It would practically be worthless.

Q. You saw this colt at Milwaukee?

A. Yes sir.

Q. And you saw it led from one depot to another in Chicago?

A. Yes sir.

Q. What was the disposition of this colt?

A. It seemed to be very kind; very nice disposition; very docile.

Q. What if anything did you see of its having any vicious habits or anything?

A. None whatever.

66 Q. You heard Mr. McElroy testified as to the pedigree of this animal?

A. Yes sir.

Q. I wish you to state to the court and jury what was the fair value of this colt on the 23d day of August 1913?

Objected to, the witness not being qualified to answer this question and objected to generally as immaterial and irrelevant.

Objection overruled and exception sealed for the defendant.

A. I would say, being acquainted with the breeding of horses, it would be worth \$5,000.00.

Mr. Patterson: Your Honor, I ask you to strike out that and the plaintiff not claiming such a sum even.

The Court: I don't know how we could strike it out. If the verdict was larger than the statement they could amend the statement.

Cross-examined by Mr. Patterson:

Q. You have shipped horses before this?

A. Yes sir.

Q. And you are acquainted with the methods of shipping horses in all their details?

67 A. Yes.

Q. How many horses have you shipped under circumstances similar to these?

A. I don't know.

Q. Many times?

A. No, not many times.

Q. You are familiar with the live stock contracts in the form in which you signed the one in this case?

Objected to as not cross-examination.

Q. Are you familiar with the usual methods of shipping horses under live stock contracts.

Objected to as not cross-examination, and incompetent and irrelevant.

Objection sustained.

Q. You have seen live stock contracts like this before?

Objected to as not cross-examination.

Objection sustained.

Q. You knew at the time you shipped this mare and colt that the rate charged by the Express Co. varied in accordance with the value that was placed upon the *value*, didn't you?

Objected to as incompetent and not cross examination.

Objection sustained.

68 Q. Did you at any time state to the agent of the Express Company the market value of this colt?

A. No.

Q. Did you know the value of it at that time?

A. I think so. I don't know whether I would or not at that time, because I knew nothing of it then.

Q. Had you seen the colt before?

A. No.

Q. You never saw the colt until that day?

A. No.

Q. You didn't know anything about how much it was worth then?

A. No. I didn't know of its breeding at that time.

Q. When you say this colt was worth \$5,000 in August 1913 you are basing your opinion entirely on what Mr. McElroy said in regard to its breeding?

A. No sir. I know as much about breeding as Mr. McElroy, if not more.

Q. Upon what do you base your opinion of the value?

A. On the pedigree.

Q. And that pedigree, so far as you know, is the one Mr. McElroy gave out to-day?

A. Yes sir.

Q. And upon the pedigree so given you base your opinion of the value?

69 A. Yes sir.

Q. This colt was a year and a quarter old at the time it was brought to Erie?

A. That is what they say.

Q. Before a colt of that kind is of any particular value it must be trained for a considerable period of time?

A. That depends a little on the colt.

Q. You know very well that no colt is worth anything as a racing horse until trained?

A. Some have a lot of natural speed.

Q. Would you say that a colt that was untrained would be of as much value as a colt that was trained?

A. It would depend.

Q. Did you ever know of a raw colt to show great speed?

A. Many of them.

Q. Can you name me one?

A. No, I couldn't. They never became very prominent after that.

Q. They showed one burst of speed that day?

A. They have for their own private use.

Q. Isn't it true, as a general rule, that all colts like this are trained in the hands of a trainer, and besides on tracks?

A. Yes sir.

70 Q. And that would be necessary in the case of this colt before anybody could discover that this colt was valuable?

A. They would have to be trained before they could ever race.

Q. And before you could know whether or not this colt was going to show speed?

A. Yes.

Q. And this colt might not have shown speed at all?

A. Might not and might.

A. Might it not?

A. I would rather believe it would show speed than that it would not.

Q. Such a condition is entirely one of experience to be learned after handling the horse?

A. Yes sir.

Q. And it is a frequent occurrence that the get of the best sires and dams often does not turn out to be of any great speed or value?

A. I couldn't say that. We only hear of so many.

Q. You only hear of the good ones?

A. You hear sometimes of the bad ones.

Q. It is a fact that a great many of the foal of well bred sires and dams do not show any great speed and are not of any great value, is it not?

A. They are some, yes sir. Some are never trained.

71 Q. What makes the value of these foals?

A. Their breeding.

Q. Do you mean to say that any horse bred as this horse is supposed to have been bred ought to be worth \$5,000?

A. Yes sir.

Q. Any colt?

A. Yes sir.

Q. Do you know of any colt untrained that sold for that much?

A. I know of one that sold untrained at auction—Harvester—for \$9,000.

Q. How old?

A. Six months.

Q. Are there many like that?

A. There was that one.

Q. That was an extraordinary occurrence?

A. It might have been.

Q. Well, wasn't it?

- A. Yes.
- Q. Can you name any others that sold for those figures?
- A. No. I have known of others selling for \$1,000.00, \$1,200 or 1,500, six months old.
- Q. How many other colts do you know that sold for \$5,000, a year and a quarter old?
- A. I couldn't say that I know of any.
- 2 Q. You say that the rate that was quoted to you on the shipment of this colt and mare was \$75.00?

A. Yes sir.

Q. And that was the rate that was inserted in this live stock contract?

Question withdrawn.

- Q. Was it dark in this car when you were traveling?
- A. The lamps were lit; gas in there.
- Q. Was it dark in there?
- A. It was light.
- Q. And when you got to Erie did you telephone Mr. McElroy that the horses had come?
- A. No, I telegraphed him from Cleveland.
- Q. When did you first see him?
- A. I guess Sunday evening.
- Q. You told him the colt was here?
- A. Yes sir.
- Q. And when you came into the Erie station you recollect who met you?

- A. I couldn't say that.
- Q. Do you know who the men were?
- A. Mr. Clark came up there.
- Q. Were there any other men?
- A. Two men to lead the horses off of the car.
- 3 A. And the door was open when these men came?
- A. I couldn't say. I expect it was. It was warm weather.

- Q. You had to have the door open?
- A. Yes.
- Q. They put a little runway up to the door?
- A. Yes.
- Q. And led the mare and colt down that?
- A. Yes sir.
- Q. Didn't you telephone to Mr. McElroy at that time and tell him that you were here and ask him what to do with the mare and colt?

- A. I don't remember that I did.
- Q. What did they do with the horses when they first took them out of the car?
- A. Took them across to the stable.
- Q. Did you lead them over?
- A. No sir.
- Q. Did you go over with them?
- A. No sir.
- Q. Did you go to the stable with them?

A. I went down the steps.

Q. When you go into the stable there is a short incline, brick, about 12 or 15 feet long?

A. Yes.

74 Q. It is an incline perhaps enough to allow the water to flow off?

A. Yes. A little bit more than that.

Q. It is the entrance of the stable as you went in?

A. Yes sir.

Q. And you walked down before or after the horses?

A. After the horses.

Q. Did you go into the stables with them?

A. Part way.

Q. Go into the stalls?

A. No.

Q. Did you examine the stalls at that time?

A. No sir.

Q. Did you make any objection whatsoever as to the condition of the stable, its floor or surroundings?

Objected to as not proper cross-examination.

The Court: You may answer that question.

A. No sir, I didn't make any examination.

Q. Were the lights lit at that time?

A. I hardly think they were.

Q. There were two electric lights and they were lit at that time, were they not?

A. I couldn't say.

Q. Was it dark?

A. Yes sir.

75 Q. You couldn't see very much of those floors?

A. It was lit up after we got in there.

Q. Then you saw the condition of the stable at that time?

A. Yes.

Q. The horses were in a stall then?

A. Yes.

Q. This depression or hole was not in the stall at all?

A. No sir.

Q. And this colt was safely in that stall?

A. Yes sir.

Q. You didn't see it fall into any hole of any kind?

A. No.

Q. And you left that evening with the horses safely in the stalls?

A. Yes sir.

Q. And at that time they were in perfect condition so far as you know?

A. They seemed to be, yes sir.

A. The doors to this stable on the outside were large double doors?

A. I think so. I wasn't very well acquainted with the stable.

Q. You made a most cursory examination of the place?

The Court: He said he made no examination of the place.

3 Q. The next day when you came down to get the horses where were you when they were brought out?  
 A. I was standing, I guess, at the top of the chute, just outside of the door.

Q. And the horses were led out one after the other?

A. Yes sir.

Q. Was the colt lame then?

A. Yes.

Q. Very lame?

A. Yes.

Q. Couldn't help but notice it?

A. Couldn't help but notice it.

Q. You said its hip was broken?

A. Dislocated in some way.

Q. How it was done you don't know?

A. No.

Q. These stalls were about four feet and a half wide?

A. I would think so.

Q. And the mare and colt were in separate stalls?

A. Yes sir.

Q. Did you see them tied in the stalls?

A. They must have been tied.

Q. Do you know whether they were tied or not?

A. I didn't see them tie the knot, no sir.

7 Dr. J. C. ELVIAGE, sworn, examined by Mr. Rilling, testified as follows:

Q. Where do you reside?

A. Erie.

Q. What is your business?

A. Veterinary surgeon.

Q. How long have you been a veterinary surgeon?

A. About 25 years.

Q. Where were you called on Monday the 25th of August 1913?

A. I was called to Wood's livery.

Q. Where is that?

A. Just off of Sassafras St. I didn't go into the stable off of 15th and Sassafras.

Q. Who asked you to come up there?

A. Mr. McElroy.

Q. What for?

A. To see a colt that was injured.

Q. Where was the colt when you got there?

A. Just outside of the stable.

Q. What condition did you find that colt in?

A. I found the cartilage at the point of the hip had been knocked off and had dropped with the muscles; and the hip joint proper was, as I thought, smashed in.

Q. What was the effect of such an injury as that to a colt, as to its value?

78 A. It was a very serious condition he was in.

Q. What effect did it have upon the value of the colt?

Objected to, the witness not being qualified.

Objection overruled and exception sealed for the defendant.

A. It simply knocked the value off of the colt, of course.

Cross-examined by Mr. Patterson:

Q. What part of the hip bone was broken?

A. The external angle of the ileum. I didn't say broken. The cartilage was knocked off.

Q. Was the ileum bone broken itself?

A. No, I don't know that the ileum bone was broken.

Q. Such an injury as this would cause lameness immediately perceptible?

A. At the time you may have some little soreness from the dropping of the point of the hip.

Q. What I want to know is whether the lameness would be immediately observed?

A. Yes, I think so.

Q. Injuries of this kind are curable?

A. They are never replaced. The muscles never get back to their place again.

Q. Sometimes injuries of this kind are cured although the horse is lame—he may be a workable horse?

A. Yes, it is a workable horse where the cartilage of the hip is knocked off; they go along and do slow work—serviceable work.

T. H. SEEFELT, sworn, examined by Mr. Rilling, testified as follows:

Q. Where do you live?

A. Milwaukee.

Q. What business are you engaged in?

A. In the heavy hardware business.

Q. What experience have you had if any in the raising and taking care of horses—fast trotting horses?

A. I have always raised a few and had a couple each year that I have been racing and looking after.

Q. From whom did the United States Horseshoe Company buy, if you know, this mare?

Objected to as immaterial.

Objection overruled and exception sealed for the defendant.

A. The mare was bought from me before she foaled.

Q. Have you a knowledge of the pedigree of the mare?

A. Yes sir.

Q. When was the colt foaled?

80 A. On the 25th of May 1912.

Q. What became of the mare and colt after the colt was foaled?

A. I had charge of the mare at the time the colt was foaled, and also a short time after the colt was foaled, and I turned them over to Mr. George Weber at West Allis, but they were under my supervision all the time while he had it.

Q. Who was Mr. Weber and what was his business?

A. He was a trainer and also kept a boarding stable.

Q. How long did they stay with Mr. Weber?

A. They were there something over a year, until the time they were shipped to Erie.

Q. Do you know when they were shipped to Erie?

A. I am not quite certain of the date. I think it was about the 23d or 24th of August 1913.

Q. Who came after them?

A. Mr. W. B. Mitchell.

Q. Who did he come to see about them?

A. He came to see me with a letter from the United States Horse-shoe Co.

Q. What did you do after he came to see you?

A. After he came to see me I accompanied Mr. Mitchell to the American Express Company—the main office.

Q. Where?

81 A. On Broadway and Michigan Sts.

Q. Milwaukee?

A. Yes sir.

Q. What was done there?

A. We spoke to the clerk in charge of the office, and Mr. Mitchell inquired the charges shipping the colt to Erie.

Q. Were you with Mr. Mitchell all the time he was there?

A. Yes sir.

Q. Did you hear all that passed between him and the agent at the time?

A. Yes sir.

Q. What took place there at the office of the Express Co.?

Objected to as immaterial.

Objection overruled and exception sealed for the defendant.

A. Mr. Mitchell made arrangements to have a car placed at the Northwestern Depot so that the horses could be loaded that afternoon.

Q. Then what did you do?

A. Then we took a couple of men and went to West Allis, Mr. Weber's place, and had the two men load the horses into the Northwestern Depot.

Q. About how far is that from where they were loaded?

A. About five miles I should say.

82 Q. Then what was done with the mare and colt?

A. When Mr. Mitchell and I arrived at the depot the mare and colt were in the car.

Q. What did either you or Mr. Mitchell do about examining them?

A. I got into the car and saw that they were properly tied, and looked them over and saw they were in perfect shape and condition.



Q. Then what did you and Mr. Mitchell do?

A. Went to the office of the American Express Company in the depot and Mitchell signed the bill of lading or receipt.

Q. State what if any inquiry or question was asked of Mr. Mitchell either at the main office or at the office where the horses were loaded, or where this bill of lading was signed, as testified to by you, about the value of the mare or colt?

Objected to as irrelevant and immaterial.

Objection overruled and exception sealed for the defendant.

A. There was no value stated on them.

Q. Was he asked to place a value on them?

A. No.

Q. What if any value did he place upon them at either place?

83 A. He placed no value.

Q. Have you seen the colt since that time?

A. No sir.

Q. What was the disposition and habits of this colt as to being gentle or kind or vicious or not?

A. The colt was gentle and kind.

Q. Who was the sire of this colt?

A. Baron Chelsey, by Oakland Baron.

Q. I wish you would state what was the character of this colt so far as its pedigree is concerned.

Objected to unless the witness of his own personal knowledge is acquainted with the pedigree of the horse outside of written sources of information such as year books and matters of that character.

The Court: If he knows the pedigree, even from the registry, I think it is competent.

Objection overruled and exception sealed for the defendant.

A. It is a very merchantable bred colt. I considered it one of the best of that had been around that part of the country.

Q. What was its pedigree?

Objected to as immaterial and irrelevant.

84 Objection overruled.

A. It was by Baron Chelsey; Baron Chelsey by Oakland Baron; Oakland Baron by Baron Wilkes; Baron Wilkes by George Wilkes; George Wilkes by Hamiltonian 10. And on the dam side was Saphronia, by Sphinx, Sphinx by Electioneer, and the dam of Saphronia was Bertha D. by Durango.

Q. What speed was there in the pedigree of that colt?

Objected to as immaterial and irrelevant.

Objection overruled.

A. This colt comes from a family that has been producing a great deal of speed, the sire Baron Chelsey has quite a number on the list, and the books show that the pedigree is about as good as anything that can be got. By looking the breeding up in the year

book—I don't know as it is necessary to go through the whole thing here, because the thing is all on record in the book.

Mr. Patterson: I move to strike the answer from the record because it is not responsive to the question, and because it shows that the witness is testifying from knowledge obtained from books, and the books are the best evidence.

Motion overruled and exception sealed for the defendant.

85 The Court: You can introduce the book if you wish to, to show that it is right or wrong.

Q. I wish you would state as to the difficulty or ability to obtain a colt with a pedigree of this character?

Objected to as irrelevant and immaterial.

Objection overruled and exception sealed for the defendant.

A. In my opinion it is very hard to get one that is sired and bred as well as this filly was, and get one that was in as good condition as she was.

Q. From your knowledge of this filly what do you state was the value of that filly on the 23d of August 1913, the date that the colt was shipped?

Objected to as irrelevant and immaterial under the pleadings, and because the witness has not shown sufficient knowledge of any sales of sufficient character to enable him to express an opinion.

Objection overruled, evidence admitted, and exception sealed for the defendant.

A. My opinion of the value of that filly is anywhere from \$3,500 to \$5,000.

Cross-examined by Mr. Patterson:

Q. This filly was about a year and a quarter old at the time?

A. Yes sir.

86 Q. More than that a little bit?

A. Somewhere in that neighborhood.

Q. And it was utterly untrained for racing purposes so far as you know?

A. Yes sir.

Q. Had been out on a farm?

A. No sir.

Q. Where had it been?

A. It had been at Mr. Weber's boarding and training stable.

Q. So far as you know it had never been trained on a track of any character?

A. It had never been trained, but it had been halter broke and Mr. Weber had a paddock where he chased them around and had it in pretty good trotting shape.

Q. Ever see that paddock?

A. Yes sir.

Q. How often?

A. Twice a week.

Q. How long was it?

A. Sixty feet square; sixty to seventy-five feet.

Q. As big as this court room?

A. No.

Q. You say he let the colts out there; chased them around?

87 A. He had a halter and rope and stood in the center of the paddock and drove the colts around.

Q. Around this sixty foot square?

A. Possibly ninety feet.

Q. Make it ninety. Any larger than that?

A. I don't think so.

Q. A colt of this character, in order to determine its value, would have to be trained for a considerable period?

A. Not necessarily.

Q. Isn't it a fact that all colts which are to be used for racing purposes are trained by professional trainers?

A. Some are not.

Q. What proportion are not?

A. There are some very good amateur trainers.

Q. Then it is a fact that in order to determine the value of a colt and what it will do, it must be trained before it is put upon a race track?

A. It must be trained before you can find out what it can do, yes sir.

Q. And as a general rule that is the course of procedure that is adopted with all young horses before you know how they are going to turn out?

A. Yes.

Q. And you might have the most wonderful bred colt in the world and he might not turn out anything? That is true?

88 A. Very true.

Q. No one can tell beforehand whether any particularly bred animal is going to do anything in actual performance?

A. You can tell a whole lot by what their ancestors have done.

Q. That gives you the idea that that horse is probably going to turn out well?

A. Yes sir.

Q. That is all it does do?

A. Individuality has a lot to do with it.

Q. Each individual horse must be judged from its own merits?

A. Yes sir.

Q. And from its breeding?

A. Yes sir.

Q. You believe that there is a good chance that an animal of good breeding and individuality would turn out well?

A. Yes sir.

Q. But you can't tell till you have tried?

A. No, not very well.

Q. In placing your estimate on the value of this horse, you are

supposing and believing in your mind that it was going to turn out into a valuable animal?

89 A. You can't look two or three years ahead. I imagined he was worth that much.

Q. What you mean, isn't it, is that if this horse turned out as its breeding would indicate, it would be a valuable horse?

A. Very much so.

Q. But you don't know of many colts a year and a quarter old, of similar breeding, which have sold for such prices as this?

Objected to.

The Court:

Q. Have you every heard of horses of this nature selling for that price?

A. Yes, I have heard of them, but I can't recall the names at the present time.

Mr. Patterson, resuming:

Q. Is there a market value such as you have stated on colts of this character generally throughout the country?

A. No sir.

Q. Do you personally know anything of the breeding of this colt beyond what you have read in the year books? I mean were you there at the time they were sired—the horses that were in the course of the pedigree?

90 A. I was there at the time this colt was sired.

Q. Yet you speak of its pedigree?

A. I haven't been following those horses around the country, but it is registered in the American Trotting Association.

Q. Your information is acquired from this American Trotting Registry?

A. Yes sir.

Q. And that is all the information that you have as to this?

A. This is sufficient, I should imagine.

Q. Is that the source of your information?

A. Yes sir.

Q. And it is on the information so received that you base your opinion as to the value of this animal?

A. Yes sir.

Q. You looked into the car in Milwaukee?

A. Yes sir.

Q. Was the colt at that time tied in the stall?

A. Yes sir.

Q. And it was facing you in the stall?

A. Yes sir.

Q. Did you go into the stall?

91 A. I walked in back of the colt, around it, and side of it but not in the stall.

Q. Did the colt move while you were in that at all?

A. No sir.

- Q. It was standing still in the stall?  
A. Yes sir.  
Q. And it had come five miles previous to this time?  
A. Yes sir.  
Q. And you were not with it during that time—during the five mile trip?  
A. Not all the way.  
Q. How much of the way?  
A. Three miles.  
Q. For two miles the colt was without your presence?  
A. Yes sir.  
Q. And you were not there when it was taken on the car?  
A. No.  
Q. And all you know of its condition in the car was obtained by looking at the colt over the bar of the stall?  
A. There was a bar alongside. You could walk in the stall next to it.  
Q. That was boarded up at the side?  
A. Yes sir.  
Q. It might have been lame at that time without your noticing it?  
A. No, it was not. I could see that the horse had two hips  
92 and right on the proper place where they belonged.  
Q. Did you examine it for any such purpose?  
A. Certainly I examined it.  
Q. What examination did you put on it? Did you put your hand on it?  
A. Yes sir.  
Q. What part of the horse did you put your hand on?  
A. I don't remember.  
Q. Why did you put your hand on it at all?  
A. Naturally a man will put his hand on a horse when you walk up to him.  
Q. You don't know what part you put your hand on?  
A. I put it on several parts.  
Q. What parts?  
Objected to.  
The Court: He says he accompanied the horse two or three miles and saw the horse after it was placed in the car.  
Q. Did you place your hands over its flanks and hips?  
A. Yes sir.  
Q. Then that is the part you touched?  
A. Yes.  
Q. You noticed nothing unusual at that time at all?  
93 A. No sir. The horse was in good condition.  
Q. It was properly tied in the stall?  
A. Yes sir.  
Q. Have you ever seen it since?  
A. No.  
Q. I understood you to say also that when Mr. Mitchell inquired

about the charges on the shipment he made no statement whatever as to the value of the horse and mare?

A. No sir.

Q. Nothing was said at that time as to that?

A. No sir.

Q. And you saw him sign this live stock contract covering the shipment at the depot?

A. Yes sir.

Q. Who was present at that time?

A. The clerk at the depot?

A. Do you know his name?

A. No sir.

On request of Mr. Patterson a gentleman Mr. Griffin stands up.

Q. Was this the gentleman that was there?

A. I had only seen the gentleman once. His face looks familiar, but I can't tell whether it was he or not.

94 W. B. MITCHELL, recalled for further cross-examination by Mr. Patterson, testified as follows:

Q. At the time this colt was shipped there was something said as to the weight of the colt between you and the agent, was there not?

A. Not that I remember, no, sir.

Q. Do you remember how much the colt did weigh at that time?

A. How would I remember how much? I wouldn't know.

Q. Do you remember or not?

A. I don't know.

Q. Do you know why the weight of 300 pounds was inserted in the contract that you signed?

A. I didn't know it was in there.

Q. Didn't you read the contract before you signed it?

A. No.

Q. Just signed it offhand?

A. I was in a hurry to get the train.

Q. Don't you remember that there was something discussed between you and the man who signed the contract on behalf of the Express Co. as to the weight of the animal affecting the expressage to be charged?

A. No sir.

Q. Was there no such discussion?

A. Not that I remember of.

95 Q. Didn't a discussion of that nature take place while the contract was being signed on the ear door, or about that place?

A. No sir.

E. W. MERILL, sworn, examined by Mr. Rilling testified as follows:

Q. Where do you live?

A. Frontier farm, on the west Lake Road.

Q. How long have you lived there?

A. Fifteen years.

Q. What experience have you had in taking care of and handling and raising horses and colts?

A. I have charge of the farms there, and we have one farm where we make a business of wintering horses for city people.

Q. What experience have you had with colts?

A. I am there every day or so and looking them over and seeing that the stables are good.

Q. Do you winter colts there also?

A. Yes sir.

Q. State whether or not you went up to this barn where this was put on August 25th?

A. I happened to go down just as they led it out of the barn.

Q. What did you observe about the colt?

A. The hip was down, as I would call it.

Q. How did it walk when it came out of the barn?

A. Sort of dragged that leg with a side motion; didn't handle as it naturally would.

Q. You say the hip was down or broken?

A. Yes sir, it was down. As to being broken I couldn't say. The point of the hip was down.

Q. Who did you see there?

A. Dr. Elviage, Mr. McElroy, Mr. Fletcher and Mr. Howell.

Q. When did you go back there again?

A. It was some time, I would say, in September, or about that time.

Q. A short time afterward?

A. Yes sir.

Q. Did you make an examination of the place where this colt had been kept?

A. I went in the barn and looked around there.

Q. What kind of a place was it?

Objected to as being too remote in time, and also because witness is not shown to have knowledge as to where the colt was placed at the time of the accident.

97 The Court:

Q. When was it?

A. I would say it was in September or October. I couldn't say exactly.

Objection overruled, evidence admitted, and exception sealed by the defendant.

Mr. Rilling, resuming:

Question read as follows:

Q. What kind of a place was it?

A. It was a very dark stable. The floor was uneven. As I

member, there was some holes in the floor as you went in the alley way, as you might call it, back of the stables.

Q. What was the construction there?

A. Built of rough boards—plank. As I remember, there was a plank sticking out in one of the stalls—the stall at the side of where they told me the colt was.

Q. What would you say as to whether or not that was a reasonably safe, proper place to put a mare and colt like that?

Objected to as immaterial.

Objection overruled and exception sealed for the defendant.

98 A. I wouldn't consider it so.

The Court: That is, providing that the stall at the time he saw it was in the same condition it was.

Q. How did this injury to this colt, as you saw it with Dr. Elviage, affect the value of that colt?

Objected to, the witness not having qualified as to values.

The Court:

Q. Are you familiar with race horses?

A. No sir.

Objection sustained.

Cross-examined by Mr. Patterson:

Q. You went there with Mr. McElroy the last time?

A. Yes.

Q. That he says was in October.

A. It was in the fall some time.

Q. If he says it was in October you would say that was correct?

A. Yes sir.

Q. That was about a month and a half or six or seven weeks after this accident?

99 A. Yes sir.

Q. And you don't know what stall the colt was in yourself?

A. No sir.

Q. And you say you think at that time there might have been some holes in the alley way?

A. Yes sir.

Q. Some holes could have been worn easily by the passage of horses in the interval?

A. Yes.

Q. Stalls in stables of this kind naturally become uneven from the horses stamping on them? The floor wears out gradually?

A. Yes sir.

Q. And a horse might slip as easily on a brand new floor—in fact would be more liable to slip—than on one that was a little uneven?

A. A nice, smooth floor, yes.

Q. Colts are right long-legged animals?

A. Some of them.



Q. Do you remember whether this was a lanky thing?

A. It was a slim-built colt.

F. M. COOK, sworn, examined by Mr. Rilling, testified as follows:

100 Q. Where do you live?

A. Erie.

Q. What is your business?

A. Livery and teaming.

Q. What experience have you had with raising horses—colts?

A. I have been working with horses all my life nearly; and I have raised some colts.

Q. Have you ever owned any trotting horses?

A. Yes.

Q. When if at any time did you go to this barn where this colt was kept?

A. I went there with Mr. McElroy and Mr. Merrill, I think around the 20th of October as near as I can remember.

Q. Make an examination of it?

A. Yes.

Q. What condition did you find it in?

Objected to as immaterial; too remote.

The Court: Mr. McElroy stated its condition was the same.

Objection overruled and exception sealed for the defendant.

A. This was a basement stable. We went in from 15th street and you go down quite an incline going in there. It was brick.  
101 Turned to the right, went into the stable and the horses headed that way. It was very dark. You couldn't see much when we got in there, but they turned the lights on afterward and then we could see around some.

Q. Was it in the daytime?

A. Yes sir, it was two o'clock in the afternoon.

Q. What would you say as to whether that was a reasonably safe place to put a mare and colt?

A. The condition of that stable was not good at all.

Counsel for the defendant moves to strike out the answer. Motion overruled.

Q. Did you see the colt at all?

A. I saw it at Dr. Mitchell's barn that afternoon.

Q. What was the condition of the colt when you saw it at Dr. Mitchell's barn?

A. Well, the point of his hip was knocked off, and the stifle apparently was a little large, and it looked as — the whirl bone at the side of the hip was mashed in. I didn't feel of it, but that was the appearance.

Q. How did the injury affect the value of that colt?

Objected to as immaterial.

Objection overruled and exception sealed for the defendant.

102 A. That colt, perhaps, if a person wanted it for slow work, might be worth something, but as a speed horse—a trotting horse—it would ruin it, I would consider, entirely.

Cross-examined by Mr. Patterson:

- Q. This visit of yours was made October 20, 1913?  
 A. It was right near that.  
 Q. Did you know that this stable was used for work horses continuously in the interval between that and August?  
 A. That was their business, I believe.  
 Q. There were horses in there every day standing on those floors?  
 A. I presume so.  
 Q. Every night? I meant every night.  
 A. Yes.  
 Q. Are there any horses kept there in the daytime, if you know?  
 A. They have kept some boarders there some times. I don't know at stalls in the barn they kept them in.  
 Q. The stable is pretty dark in the daytime, and there are no horses of any moment kept there in the daytime?  
 A. I didn't see any when I was there.  
 Q. It is a night stand, isn't it?  
 A. No, not especially.  
 Q. Ever see any horses in there in the daytime?  
 A. Yes.  
 Q. How many times?  
 A. I don't know. I have been there a few times.  
 Q. There are two large folding doors at one end which would admit light if they were open, right in front of the brick runway?  
 A. They would admit some light. You go in those doors and go down this runway, and then into this stable. That is a brick wall along there. There isn't any light to come in there.  
 Q. There are electric lights there?  
 A. There was a light there.  
 Q. By those lights you were able to make examination?  
 A. You could see, of course.  
 Q. You didn't know what stall the colt had been in?  
 A. I didn't see the colt in the barn. They told me it was in the stall back next to the box stall.  
 Q. Who told you that?  
 A. I can't tell you.  
 Q. You have no information other than what was told, where it was?  
 A. That is all.  
 Q. You didn't see the colt in the stall?  
 A. No.  
 Q. You don't know what stall it was in except what was told you afterwards?  
 A. That is right.

THORN PIERCE, sworn, examined by Mr. Rilling, testified as follows:

- Q. Where do you live?  
 A. East Lake Road.  
 Q. What experience have you had in raising horses and taking care of them?

A. In the neighborhood of 35 years.

Q. What kind of horses?

A. I have raised from standard bred horses to so-called Percherons and Clydes; plow horses.

Q. Trotting horses?

A. That is what I have reference to.

Q. Did you examine this place on 15th Street where this colt had been kept?

A. Yes, the week of the 20th of October.

Q. Who went there with you?

A. Mr. Cook, and I think Mr. Howell, and one or two others. Mr. McElroy I think was along.

Q. Did you examine this place?

A. I did, sir.

Q. What was its general construction? What did it consist of?

Objected to as immaterial and irrelevant.

Q. What kind of a place was it?

A. We went into Mr. Wood's barn from the south; went down a steep incline they made temporarily, and as we went in there I stopped at the foot of the stairs. It was dark. I couldn't see where I was going. The barn man or somebody snapped the light on. There was a watering-trough right there, and as quick as the light was on I could see where the telephone was and I went on over to the telephone.

Q. How many stalls?

A. Four, I think. In the neighborhood of four.

Q. How were they reached?

A. We turned to the west, and the stalls faced the southwest.

Q. You heard the testimony as to this mare and filly having been put in that barn?

A. Yes sir.

Q. What would you say as to that being a reasonably safe place to put a mare and colt of that age?

Objected to as immaterial and irrelevant under the pleadings.

Objection overruled.

Question withdrawn.

106 Q. Did you make any observation as to the condition of that place there?

A. I did.

Q. What did you find?

A. Found some stalls. The barn man said they were transient stalls, temporarily put in there; studding up and down, and boards just nailed on to one side of this studding.

Q. What would you say as to that place being a reasonably safe place to put a mare, and colt a year and three months old?

Objected to as immaterial and irrelevant under the pleadings, and because the examination was not made in a reasonable time after the accident is alleged to have occurred, and because the evidence

does not tend to prove any negligence on the part of the defendant company.

Objected overruled and exception sealed for the defendant.  
Question read.

A. No good. It wouldn't be good for no horse.

Cross-examined by Mr. Patterson:

Q. You don't know which stall the filly was put in?

07 A. I know which stall they told me it was in.

Q. Who told you?

A. The barn man; Mr. Wood's man.

Q. He was not an employe of the American Express Company?

A. No sir, not that I know of.

Q. The condition of this stall, so far as you know, might have been different from what it was August 25, 1913?

A. I couldn't say as to that.

Q. You don't know what change had been made in it?

A. I couldn't say that.

Q. Who told you these stalls were temporary stalls?

A. The barn man.

Q. He didn't tell you how long they had been there?

A. No.

Q. The floors of stalls of that character wear out, don't they, if horses are standing on them in the night time?

A. Certainly.

Q. These were wooden floors?

A. Behind the stalls it was.

Q. Under the horses wooden floors?

A. It was dark. I couldn't see.

Q. Did you go into the stalls?

A. It was too dark.

Q. You couldn't see what was in the stalls?

08 A. I couldn't say. I could see behind the stalls.

Q. Well, the horses stand in the stalls, don't they?

A. Yes.

Plaintiff offers in evidence the bill of lading testified to by Mr. Mitchell, Exhibit B, and the same was received in evidence without objection.

Plaintiff Rests.

Defendant moves for judgment of compulsory non-suit on the ground that there is no evidence of negligence under the pleadings to sustain any verdict from the evidence produced.

Motion overruled.

L. L. CLARK, sworn, examined by Mr. Patterson, testified as follows on behalf of the defendant:

Q. Where do you live?

A. In Erie.

Q. And you have been here how long?

A. About five years.

Q. You are agent of the American Express Co. here?

A. Yes sir.

109 Q. For how long a time have you been agent?

A. About five years.

Q. You were agent then in August 1913?

A. Yes sir.

Q. Do you remember on August 24th having notice that the horses consigned to Mr. Mitchell had arrived in Erie?

A. I remember being telephoned it had arrived.

Q. Did you have any conversation with Mr. McElroy at that time as to the disposition of the horses?

A. None whatever.

Q. When did you see him in regard to it?

A. The following afternoon.

Q. Was that before it was taken away or afterwards?

A. It was while it was being taken away.

Q. Previous to the time you obtained Mr. McElroy's signature to the receipt for the horse?

A. No.

Q. Did you afterwards, after the horse had been delivered send any bill to Mr. McElroy for expressage thereon?

Objected to, and question withdrawn.

Q. Did you send any bill for the expressage on this horse and mare from Milwaukee to Erie at any time to Mr. McElroy as president of the United States Horseshoe Company?

110 A. A bill was sent by the office.

Q. Do you remember what was the amount of that bill?

A. I think \$69.00.

Q. Was that bill paid?

A. That bill was paid.

Q. Do you remember when that bill was paid?

A. I couldn't say the exact date. I think something like ten days or two weeks after.

Q. After the 25th of August?

A. Yes sir.

Q. Were you at the stable that day?

A. I was there the 25th of August.

Q. Is that stable used in the daytime to any extent?

A. Not to any great extent.

Q. Did you go into the stable that day?

A. Yes.

Q. Did you examine the stall thoroughly inside?

A. Yes, I looked it over.

Q. Did you examine the stalls in the stable?

A. I looked them over, observed them as I walked past them.

Q. Did you examine the floor of the stalls?

A. Yes.

Q. State whether or not there were any holes in that flooring?

A. Not that I noticed.

- 11 Q. It was in what condition?  
 A. The same as would be found in most any stable—plank flooring.  
 Q. Any unusual ridges of any character?  
 A. None that I recall.  
 Q. Did you look at each separate stall?  
 A. No, I looked at the two that the mare and colt were in.  
 Q. Did you observe anything unusual in the floor or sides of the stalls at any time?  
 A. I did not.  
 Q. What time on that day did you get over there?  
 A. I should say about 2:30 or 2:45; possibly 3 o'clock.  
 Q. Was Mr. McElroy with you?  
 A. I met him at the depot office. The horse was standing outside when I reached there.

The Court:

- Q. That was 2:30 Monday?  
 A. Yes sir.  
 Mr. Patterson, resuming:  
 Q. Did you notice any lameness in the horse while you were here?  
 A. Yes. The horse was lame at that time.  
 Q. That was the colt?  
 A. Yes.

12 Cross-examined by Mr. Rilling:

- Q. You say that you were informed by someone that the horses had arrived on Sunday?  
 A. Yes.  
 Q. What did you do.  
 A. I told them to notify Mr. McElroy. I was notified by telephone.  
 Q. Did you go up and see the horses unloaded?  
 A. No.  
 Q. You didn't go up to see them unload it at all?  
 A. No.  
 Q. You don't know who unloaded them?  
 A. I didn't see who unloaded them, but the depot men here who had charge of the depot office were instructed to unload them.  
 Q. You went up on Monday?  
 A. Yes. One of the employes of our depot telephoned Mr. McElroy was there and would like to see me. Mr. McElroy went up in advance, and they discovered the animal was injured.  
 Q. And they sent for you?  
 A. Yes sir.  
 Q. Wasn't that Monday forenoon?  
 A. I think it was Monday afternoon.  
 13 Q. And when you got up there who was there?  
 A. I remember Mr. McElroy, Mr. Fletcher and Dr. Elviage. I can't say as to any others.

Q. And the mare and colt was **there**?

A. Yes sir.

Q. And the colt was injured?

A. Yes.

Q. And you went in and examined the stalls?

A. Yes.

Q. You said you didn't notice any holes in the floor?

A. I did not.

Q. It was pretty dark in there?

A. It is a basement stable. It is not as light as a ground floor stable, but there are electric lights in it.

Q. You have to turn them on?

A. Yes.

Q. They were not turned on when you made your examination?

A. Oh, yes. We turned the lights on.

Q. You say you sent a bill for this \$69.00 which was paid?

A. Yes, from the office.

Q. Did you have any conversation with Mr. McElroy before that bill was paid?

A. None whatever except Monday. Nothing about the charges on it.

114 Q. Didn't he object to paying that bill?

A. I don't remember.

Q. And didn't you say "We want to get our books straight and any bill that you may pay won't have any effect on this injury"?

Objected to as irrelevant and immaterial.

Objection overruled and exception sealed for defendant.

A. I don't remember anything being said about payment of the bill. I remember Mr. McElroy spoke about having signed for the shipment and mentioned the fact that he had signed for it, and I believe before he had examined it. He spoke about that feature, as to whether or not his signature should not be erased or something of that kind.

GUS EICHER, sworn, examined by Mr. Patterson, testified as follows on behalf of defendant:

Q. Where do you live?

A. Erie.

Q. And you have been living here for some time?

A. 14 years.

Q. By whom are you now employed?

A. The Pennsylvania Railroad Co.

115 Q. In August 1913 you were working for the American Express Co. here?

A. Yes sir.

Q. Do you remember on the 24th of August 1913 being down at the depot of the American Express Co. here?

A. Yes sir.

Q. Who was with you?

A. Jarry Rose.

- Q. What were you doing down there that day?  
A. That was my Sunday on duty.  
Q. Do you remember this mare and colt coming in on the car from Milwaukee?  
A. Yes.  
Q. What did you do when the car came in there?  
A. When the train first came in we unloaded our other freight, and a shifter got hold of the car with the horses and set her on the siding; and after we had our freight in the office, then we started to unload the horses. Rose went over to see the car and came back and he said "Well, we will have to take the runway over."  
Q. What do you mean by the runway?  
A. Thing you put on the car, fasten it there, and have the horse walk down.  
Q. About how long?  
16 A. Between 12 and 14 feet.  
Q. How wide?  
A. Between three and a half and four feet.  
Q. Any sides?  
A. Yes.  
Q. Cleats on the bottom?  
A. Yes.  
Q. What did you do with this runway?  
A. Hauled it over there on a truck, backed the truck up, and fastened the end in the car sills, places provided for those cleats to go in to, pulled the truck out, lifted it down, took the truck out of the way and got the horses.  
Q. Who brought out the colt?  
A. I did.  
Q. What did you do with the colt when you brought it out?  
A. Led it up alongside of the mare.  
Q. Where was it then?  
A. About ten feet from the runway.  
Q. Did you lead it to the stable yourself?  
A. No.  
Q. Who did?  
A. One of the barn men.  
Q. Was it in good condition when you had it?  
17 A. It was.  
Q. Was it limping any?  
A. No, it was not.  
Q. Did you go into the barn that day?  
A. No sir.  
Q. How frequently were you in this barn?  
A. About four times a day except Sundays.  
Q. As you come up to the barn what doors are there into it?  
A. Double doors in the front and back.  
Q. Is it a barn that is occupied much in the daytime?  
A. No, not very often.  
Q. How is it lighted inside?  
A. Electric lights.



Q. When these electric lights are lit can you see around the barn well?

A. Yes.

Q. How much of a declivity or fall has that runway around the barn?

A. Not any more than just to let the water wash off.

The Court:

Q. That is the entrance of the barn?

A. Yes.

Mr. Patterson:

Q. Inside of the barn?

118 A. Yes.

Q. How long is that runway?

A. Possibly about ten feet square—possibly more.

Q. When you get down to the bottom of the runway at which hand are the stalls, coming in from 15th street?

A. The stalls are on the right hand.

Q. About how wide are these stalls?

A. I should think about four or four and a half feet.

Q. Did you see Mr. Mitchell go into the barn with the mare?

A. No, I did not.

Q. Have you often seen the floor of those stalls?

A. Yes; every day.

Q. Can you tell me what its condition was at this time?

A. About the same as any horse barn would be that is used every day.

Q. Any holes or obstructions in the floor that you observed?

A. Not to my knowledge.

Q. It was the ordinary barn floor?

A. Just about the ordinary barn floor.

Q. And side pieces or any obstructions in the sides of those stalls?

A. No.

119 Q. Any loose boards of any kind?

A. No.

Q. Did you see the horse the next day?

A. No.

Q. And you didn't take it yourself in the barn at all?

A. I did not.

Q. This barn is occupied by the American Express Company own horses?

A. It is.

Cross-examined by Mr. Rilling:

Q. The Express Company keeps its horses there?

A. Yes sir.

Q. And if it is necessary for the keeping of any animals or shipments it keeps them in this barn?

A. I wouldn't say that. I never knew any.

Q. Is this the only horse they put in this barn?

A. To my knowledge it is. It is the only time I helped unload any.

Q. This barn fronts on the alley from the south?

A. Yes.

Q. As you drive in the alley it is level with the floor?

A. Yes.

Q. But approaching from the north you go into the basement?

A. Yes.

120 Q. The place where these horses were kept was in the basement?

A. Yes.

Q. Do you mean to say that the fall of ground at Sassafras at 15th is such or so great that if you went into this barn from the south it was level with the floor, and if you approach it from the north you would only have to go down a declivity sufficient that the water would run off?

A. Yes, because the barn where they keep their wagons is straight from the alley; the other is basement and there is not much of an incline.

Q. Don't you drive right into the barn floor level with the alley?

A. You do. There is not very much incline.

Q. How is it possible that there is only a little incline?

A. The alley is considerable higher.

Q. The ground is all the same along there between Peach and Sassafras St.

A. I don't think it.

Q. You didn't see Mr. Mitchell go into the barn?

A. No.

Q. What do you mean by that?

A. Because there was an accomodation stands on what they call the Morton House track and that stands there over Sunday,  
121 and don't go out.

Q. You didn't go over to the barn at all?

A. No.

Q. Why didn't you say you didn't go to the barn?

A. I said I didn't know whether he went in or not. I didn't see Mr. Mitchell go into the barn.

Q. What were you doing in there four times a day?

A. Getting a horse out in the morning, taking it back at noon, getting it back out, and taking it back at night.

Q. You were driver for the company?

A. I was.

Q. They kept their horses there?

A. Yes sir.

Q. How did they come to take these horses over into that barn?

A. The man that was acting depot agent that day said he had orders to take them over to the barn—who from he didn't state.

The Court:

Q. You mean the man in charge of the Express Co.?

A. Yes, at the depot.

Adjourned until ten o'clock tomorrow morning.

122

*Proceedings of February 5, 1915.*

W. M. GIFFIN, Sworn, examined by Mr. Patterson, testified as follows:

Q. Where do you live?

A. Milwaukee, Wis.

Q. By whom are you employed in Milwaukee?

A. The American Express.

Q. By whom were you employed on the 23d of August 1913?

A. The American Express.

Q. Do you remember on that day meeting Mr. Mitchell with reference to a shipment of a colt and mare from Milwaukee to Erie?

A. I do.

Q. Where did you see him?

A. At the Chicago & Northwestern depot, at the foot of Michigan St.

Q. In Milwaukee?

A. Yes sir.

Q. You were acting agent at that time on the part of the American Express Co.?

A. I was.

Q. I wish you would state what took place at the time the horses were shipped, at the time of the signing of the live stock contract?

123 Mr. Patterson: I want to show the circumstances under which that contract was signed.

The Court: We will permit you to show the conversation leading up to it.

A. On August 23, 1913, I had orders to go to the Northwestern depot, take a horse and make out a live stock contract for a gentleman by the name of W. B. Mitchell. I went there, had the car put on the siding, and a runaway or lead placed to the side of the car. Mr. Mitchell was somewhat late in getting there. He got there somewhere between 5:25 and 5:30 in the evening. We loaded the horses and switched the car around. I went into the office—the depot office—and got one of the live stock contracts and started to write it by the side of the car.

Q. Was the colt loaded?

A. The colt and horse both loaded, and switched on to the main line. I said "I will have to go in to see what it will cost to ship them, include them in this lease."

Q. What do you mean by lease?

A. Live stock contract. He followed me in and I figured it would cost \$75.00, taking the horse at 500 pounds.

Q. Horse or colt?

124 A. The colt. The horse was billed at a thousand pounds and the colt at five hundred.

Mr. Gifford: We object to this testimony for the reason it seeks

to vary the terms of a written instrument; and it is incompetent and irrelevant. And we ask to have it stricken out.

The Court: It is not to alter the terms; it is the conversation that led up to this.

Motion overruled.

The witness, continuing:

A. I meant by that that it would cost to transport this mare and \$75.00.

Q. Upon what basis?

A. 1,000 pounds for the mare and 500 for the colt. Mr. Mitchell said "the colt don't weight 500, he only weighs 300." He said, "We weighed him some time ago." There was a gentleman with him. I said "we haven't got time to take him out of the car and weigh him, and if there is any correction for weight they can correct it at Erie."

Q. The word C. W. Taylor for the Company is written here. Did you write the word C. W. Taylor?

A. I did.

Q. You signed his name to the contract in the usual way?

A. I did.

125 In this contract, opposite the words For Horses, Jacks or Mules, In Section 3, is written \$100.00. State how and under what circumstances you happened to write those particular figures in that particular contract?

Objected to as incompetent, irrelevant and immaterial; it seeks to change the written contract.

Mr. Patterson: The purpose is to show that these words were written in error in the wrong place in the contract: to be followed by evidence showing what the rates were filed with the commission for those values.

The Court: I don't think it is proper unless they show that they advised Mr. Mitchell of that mistake at the time. If that knowledge was brought to Mr. Mitchell before the articles were shipped it might be competent.

Mr. Patterson: We propose to prove by the witness on the stand that at the time the live stock contract was signed by Mr. Mitchell and by himself as agent for the Express Company that a conversation took place the substance of which was that the rate of expressage charges varied with the values fixed upon the animals; that the minimum valuation upon which the rates were based was 126 \$100.00 for a horse and \$50.00 for a colt, and that the witness now upon the stand, in the haste of the moment, inserted the words \$100.00 opposite the words "For horses, jacks" etc., and the words \$50.00 opposite the words "bulls, colts etc. instead of inserting such values in Section 5 of said contract opposite the words Number and Kind, Value Each, so many dollars. This for the purpose of proving that the figures were inserted in the wrong place in the contract in error by the mistake of the witness; to be followed by proof that the rates charged the shipper and consignee

were based upon those valuations in accordance with the rates and schedules filed with the Interstate Commerce Commission by the Company.

The offer is objected to as incompetent, irrelevant and immaterial. It seeks to vary or alter the terms of a written instrument, the bill of lading, upon which the defendant company accepted these horses for shipment and forwarded them.

The Court: As the proposition stands, the objection is sustained and exception sealed for the defendant. If they can show  
127 further that the mistake was understood, that the real facts were understood by both the shipper and the defendant, it might be a different proposition.

Mr. Patterson, resuming:

Q. Did you have a conversation with Mr. Mitchell at that time with reference to any increase of rate if an increased valuation over fifty dollars was stated for the colt?

Objected to. Objection overruled.

A. I did.

Q. What was said by you and Mr. Mitchell in that conversation with reference to an increased charge for an increased valuation over fifty dollars?

Objected to as incompetent, irrelevant and immaterial, and a seeking to vary the written instrument upon which the defendant accepted these horses and shipped them.

Objection overruled.

A. When I figured the rate——

Q. What was said?

A. I would have to tell that to explain. He thought I was billing it at too much weight. I told him I would have to have that correct to show what value would be allowed, \$100.00 on the  
128 mare and \$50.00 on the colt. He says, "I understand that thoroughly. I know all about it. I made arrangements at the main office this morning." I told him if this colt weighed less they would detect it at Erie.

Q. Did any conversation pass between you showing an increased rate for an increased valuation over fifty dollars?

Objected to as incompetent, irrelevant and immaterial, and seeking to vary or alter the terms of this written contract.

Objection overruled.

A. Yes, I told him it would cost him one per cent more on the valuation over the state amount.

Q. Over fifty dollars?

A. Yes.

Q. One per cent. on what?

A. On the valuation. One per cent. on any excess valuation over fifty dollars on the colt.

Q. Then what did you do after that conversation took place?

A. The train was just about pulling out and he started for the train. I think he barely got on. I followed him up and handed this receipt to him.

Q. Did he sign the receipt at that time?

A. Yes sir.

129 Q. After this conversation?

A. Yes. That was the last thing that was done. He signed after I did.

Q. At the time you handed him the receipt you had inserted in the contract this \$100.00 and \$50.00?

A. Yes sir.

Q. Will you state why these figures were inserted in the places in which they now are in the contract instead of being inserted in their proper place in Schedule Five?

Objected to as incompetent, irrelevant and immaterial, and seeks to vary or alter the terms of the written instrument on which this defendant company accepted the horses for shipment.

Objection sustained and exception sealed for the defendant.

Q. If the colt had weighed more than 500 pounds would it have taken a different rate?

A. It would.

Q. An increased or decreased rate?

A. Increased.

The Court:

130 Q. Don't you weigh articles when they are given to you to ship?

A. We do where there is any question, but this gentleman got there so late we didn't get time to weigh it. The train was pretty near going. I told him that they would weigh it at the other end.

Q. If they sent a bill less than \$75.00 to Erie, that would indicate the colt didn't weigh that much?

A. Yes.

Mr. Patterson:

Q. Your rate of \$75.00 was figured on 500 pounds?

A. Yes sir.

Q. And the 300 pound rate would reduce the expressage charge?

A. Yes sir; it would reduce it to \$69.00.

Cross-examined by Mr. Rilling:

Q. You say you went out and saw this colt?

A. Yes.

Q. What business have you been in before you worked for the Express Co.?

A. In the cartage business.

Q. How long have you worked for the Express Co.?

A. About 28 years.

Q. You inserted the weight of this colt, after seeing it,  
131 as 300 pounds?

A. Yes sir.

Q. Did you think that was the right weight to insert after you saw it?

A. I did.

Q. You thought it weighed 300 pounds, a colt a year and a quarter old?

A. Yes.

Q. Why did you make out the bill of lading at \$75.00?

A. I had that made out previous to Mr. Mitchell calling my attention that the colt did not weigh 500. I said "I put it down at \$75.00 because I must put this \$75.00 down there to show the valuation, and if I have overcharged you they will correct it at Erie."

Q. Where was Mr. Mitchell when you handed him this contract? You said it was just before the train left?

A. Walking on the platform, going for the train.

Q. Who was C. W. Taylor?

A. General agent of the American Express.

Q. Where?

A. Milwaukee, Wis.

By Mr. Patterson:

Q. This signature for Mr. Taylor is the ordinary way in which contracts are signed—by the employe in the name of the  
132 agent?

A. Yes sir.

L. A. McELROY, recalled for cross-examination by Mr. Patterson:

Q. You stated yesterday that you had no recollection of any telephone conversation with the agent of the Express Co. on Sunday the 24th of August with reference to this shipment?

A. Other than the conversation we had when I called him on the phone. I told you that I called him on the phone and advised him of my having received this telegram.

Q. Please look at your letter dated October 7, 1913, and refresh your recollection, and see if it is not true that he called you on the telephone and spoke about the disposition of these two horses. Whether or not it is not true that one of the Express Company's agents called you on the telephone and told you that the horses were in town, and that you stated to him that they ought to be put in the stable until they could be delivered the next day?

A. I called your Express agent, telling him I would be unable to take charge of the horses—they would have to take care of  
133 them.

Q. That does not refresh your recollection that he called you on the telephone?

A. It does not. I was in the city in the evening.

Q. You were at your country place in the morning?

A. Yes; that is where I called him from.

J. J. ROSE, sworn, examined by Mr. Patterson, testified as follows  
behalf of the defendant:

Q. By whom are you employed?

A. By myself. In business for myself.

Q. You live in Erie?

A. Yes sir.

Q. By whom were you employed on August 24, 1913?

A. American Express Co.

Q. Do you recollect this car coming into the depot with the mare  
and colt in it?

A. Yes sir.

Q. When did you first hear that the car had arrived?

A. I got a message from our agent at Cleveland previous to the  
arrival of the train that it was coming.

Q. When did you see the car first?

A. When it was switched over.

Q. About what time?

A. Between one and two in the afternoon.

Q. What did you do?

A. As quick as the car was placed I went over to see what it  
was, and there was no one there in the car. I came back to the  
depot and Mr. Mitchell came in about that time.

Q. That is the Mr. Mitchell who was on the stand yesterday?

A. Yes sir.

Q. Go on.

A. He came in about that time. He said something that he had  
phoned or that I should phone to McElroy, and I called Mr. McElroy  
at his summer home.

Q. You are sure you called him up?

A. Yes.

Q. Detail the conversation.

A. He said he was out in the country and would be unable to ac-  
cept delivery until Monday. He said to put them in a barn.

Q. Was that all the conversation?

A. I told him they were in good shape.

Q. Then what did you do?

A. Took a horse bridge, put it up to the car, took them out of the  
cars and led them out.

Q. Which one did you lead out?

A. The mare.

Q. Did you see the colt led out?

A. Yes sir.

Q. In what way was she led out of the car?

A. Mr. Eicher led her out. They both came out very nice.

Q. What did you do with them?

A. Turned them over to the barn men.

Q. Did you lead them in the barn?

A. No.

Q. You gave them to the barn attendants and they led them over  
to the barn?

A. Yes sir.



Q. You didn't go over to the barn with them?

A. No sir.

Q. At that time did you notice the colt's walk action at all?

A. No sir. The colt was all right as far as I could see. I didn't look it over though.

Cross-examined by Mr. Rilling:

Q. What day of the week was it when these horses came?

A. Sunday.

Q. You think that you called up Mr. McElroy instead of his calling you up?

136 A. I called him up, yes sir.

Q. He told you he could not take delivery of the horses that day?

A. Yes sir.

Q. And you didn't offer to deliver them to him?

A. I called him up to see if I could deliver them to him.

Q. On Sunday?

A. Yes sir.

Q. And he told you he couldn't take delivery?

A. Yes sir.

Q. You didn't offer to make delivery?

A. I called him to see if he couldn't take them. I told him they were here and ready for delivery.

Q. How did you come to put them in Mr. Wood's stable?

A. Because the company kept their horses there, and any horses where we couldn't deliver we always put with our horses.

Q. You directed the place where they were to be taken?

A. Yes sir.

By Mr. Patterson:

Q. Was Mr. Mitchell there when the horses were unloaded?

A. Yes sir.

Q. Did he accompany the horses over to the stable?

A. Yes sir, he followed them right along behind.

137 GEORGE T. CARLIN, sworn, examined by Mr. Patterson, testified as follows:

Q. You are superintendent of the American Express Co., at Cleveland, Ohio?

A. Yes sir.

Q. And you were superintendent on August 23, 24 and 25, 1913?

A. Yes sir. For the past eight years.

Q. How long have you been with the company?

A. 25 years.

Q. You have supervision over the Erie office?

A. Yes sir.

Q. In your business as superintendent are you familiar with the rates of the Express Company, the defendant in this case, the way they are calculated and upon what they are based?

A. Yes sir.

Q. Have you had experience in calculating the rates from the schedules filed—the ones in force at this time?

A. Yes sir.

Q. How long have you had experience in such things?

A. Ever since I was with the company.

Q. I show you defendant's Exhibit C, being the official Express Classification No. 21, Supplement No. 11, and the local and joint Tariff No. 1 C, and Supplements Nos. 5-3 in force on the lines of the defendant company on August 23, 1913, properly certified by the secretary of the Interstate Commerce Commission, and ask you in what method the rates are found from these tariffs and schedules upon a mare and a colt from Milwaukee to Erie. Would ask you to point out the various ways in which this rate is determined from these tariffs.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled for the present and exception sealed for the plaintiff.

A. We first determine by the classification under the tariffs that is contained in 1913, what classification an article is, and whether it is subject to commodity rate, merchandise rate, or more than a merchandise rate. Then, after determining whether it is merchandise, you refer to the local and joint tariff and find the numbers of the offices between which you want to transport the business. There is what you call division of sections in the local and joint tariff.

Q. Section one includes Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, Virginia, W. Virginia; and the states west of those states they call Section C, which includes practically all of the states to the Missouri River and possibly west of the Missouri.

Q. Does it include Wisconsin?

A. Yes, under Section 2. You have to find the number of the Milwaukee office, if you want to find the rate from Milwaukee to Erie, then turn to Section one and find the number of the Erie office.

Q. What is the number of the Milwaukee office?

A. No. 601, under Section Two.

Q. What is the number of the Erie office?

A. To find the rate between the Erie office, which is in Section one, and the office in Section two, the number of the Erie office is 510, and you find the rate between 601 and 510.

Q. In what classification?

A. In the same local tariff on page 35, where the blocks meet. 510 comes down to meet 601. That makes the rate—that is, merchandise rate.

Q. That is to say, following Milwaukee through tariffs and following Erie through tariffs you come to a common number and that common number is a merchandise rate?

A. It lies between the two numbers.

Plaintiff objects to the witness stating what those rates were.

Q. Having determined the merchandise rate how do you determine from that the rate on a horse and colt between these two points?

A. You find the classification of a horse and distinguish between horses in carload lots and single, where you have to provide separate stalls in the car, put them up and take them down. What was then the merchandise rate applied.

Q. Point out to me in those tariffs and classifications where the rate on horses and colts appears?

A. On page 22 of Classification Card No. 21, I. C. C. No. 633, Article six: Horses, single animal, must be estimated at 1,000 pounds; three times merchandise.

Q. As to colts?

A. Article seven: Jacks, mules, burrows, ponies or colts, animals weighing not over 500—

141      Objected to for the reason that the weights speak for themselves.

Objection overruled and exception sealed for the plaintiff.

Q. Go on.

A. Animals weighing not over 500 pounds, each, not crated, one and a half merchandise. Animals weighing over 500 pounds each and not over 1,000 pounds each, not crated, classify the same as a horse.

Q. Can you say where in these tariffs the rate is based upon any minimum valuation?

A. That is the same classification book, page 8, Art. 11, Paragraph G.

Plaintiff objects generally to the introduction of the line of evidence now being offered, being the contents of the exhibit, as being incompetent, irrelevant and immaterial.

Objection overruled for the present.

Q. You may continue.

A. "Valuation Charges on Live Animals, Live Birds, Live Stock. The classification rates on live animals, live birds or live stock apply only when the declared value does not exceed the following: Horses, jacks or mules \$100.00 each. Bulls, burrows, calves, colts, cows, deer, dogs, elk, goats, hogs, ponies, sheep steers, or animals  
142      not otherwise specified \$50.00 each."

Q. Have you followed through these classification and rate sheets all the figures applicable to a shipment?

A. No, I have not completed that part of it.

Q. I want you to complete the reading of the schedules of the classification so far as it affects the shipping of a colt?

A. "When the value declared by the shipper exceeds that given above an additional charge must be made on the excess value according to the following: When the merchandise rate is not over \$2.00 per 100 pounds the additional charge will be one per cent. of the excess valuation. When the merchandise rate is over \$2.00 and not over \$3.00 per 100 pounds the additional charge will be one and a half per cent. of the excess valuation." (Page 8.)

Q. Upon a valuation not exceeding 100 dollars for a mare and exceeding \$50.00 for a colt, where the weight of the colt is estimated to be 300 pounds, what, in the method which you have decided to us, would be the expressage charge for the shipment of a mare and colt from Milwaukee to Erie?

Objected to as incompetent, irrelevant and immaterial, and for the further reason that there is no value stated in the bill of lading or contract between the parties to this suit. Objection overruled for the present and exception sealed for the plaintiff.

A. The mare's weight would be 1,000 pounds at three times merchandise, and the merchandise rate being \$2.00 between Milwaukee and Erie, it would be six dollars a hundred pounds, or sixty dollars for the mare. On the colt it would be subject to one and a half times merchandise rate of \$2.00, which would make the colt rate at \$3.00 a hundred, and on 300 pounds it would be three times that, or nine dollars, making a total on the mare and colt of \$69.00.  
Q. If the colt had weighed 500 pounds what would have been the charge?

Objected to for the same reason just given. Objection overruled and exception sealed for the plaintiff.

A. It would be three times 500, making \$15.00, and with the \$54.00 on the mare it would make a total of \$69.00.

Defendant offers in evidence such portions of the tariffs and classifications as the witness has identified as being applicable to this shipment, for the purpose of avoiding the introduction of the entire book.

Objected to as incompetent, irrelevant and immaterial, and for the further reason that the contract between the shipper and the defendant company contains no limitation of the value of the shipment; and for the further reason that the schedule or tariff did not apply to this case. And for the further reason that the contract on which the shipment was made in no way refers to the tariff schedules now introduced in evidence, and that the said schedules are no part of the contract between the parties.

Objection overruled.

Defendant Rests.

### *Rebuttal Testimony.*

THORN PIERCE, recalled, examined by Mr. Gifford, testified as follows:

Q. I call your attention to the testimony of one or two witnesses for the defense that the place where these horses were kept was the same place that the American Express Co. kept their own delivery horses, and ask you whether you are sufficiently familiar with the goods barn to be able to so say?

A. The American Express Co. kept their horses in another part of the barn. The barn man said that these were transient stalls.

Counsel for defendant moves to strike out the latter part of the answer. Motion granted.

Q. State whether or not the place where these horses were put or kept at the time in question was the same part of the barn where the American Express Co. kept their horses?

A. No sir.

Cross-examined by Mr. Patterson:

Q. How often were you there?

A. I have been there several times.

146 Q. How often were you there before the 23d of August 1913?

A. I couldn't say just how often, but a number of times.

Q. How many times?

A. I suppose fifty times.

Q. Is your information that you are giving out here obtained from personal observation or what you have been told by the barn man?

A. I was there myself.

Q. Do you know of your own knowledge that the Express Company's horses were not sometimes kept in these particular stalls?

A. That I couldn't say.

Q. You don't know that one way or the other?

A. I couldn't say that.

Q. You don't know of your own knowledge whether or not the Express Co. stabled in these particular stalls?

A. No sir.

W. B. MITCHELL, recalled, examined by Mr. Rilling, testified as follows:

Q. You heard Mr. Giffin's testimony just now?

A. Yes sir.

147 Q. State what if any weight you gave to Mr. Giffin at Milwaukee of this mare or colt?

A. None whatever.

Q. Did you give any weight at the main office?

Objected to as leading. Objection sustained.

Q. What if any statement did you make to the agent at Milwaukee, at either office, as to the weight of this mare and colt?

Objected to because the contract on which the plaintiff is declaring states a weight of 300 pounds, and this contract was accepted by Mr. Mitchell.

Q. Where did you sign this contract?

A. In the office at the depot.

Q. What conversation did you have with Mr. Giffin, if any, re-

garding the minimum valuation on which to base the freight charges?

A. None at all.

Cross-examined by Mr. Patterson:

Q. This contract was complete as it is now when you signed it?

A. Yes sir.

148 T. H. SEEFELT, recalled, examined by Mr. Rilling, testified as follows:

Q. What if any statement as to the weight of either this mare or colt was made by Mr. Mitchell to either of the agents of the Express Co. at Milwaukee?

No answer.

Q. What statement if any did Mr. Mitchell make to Mr. Giffin at the time this contract was signed, as to the weight of these animals?

A. I don't think there was anything said about the weight.

Q. What was said by Mr. Mitchell or by Mr. Giffin to Mr. Mitchell regarding the minimum valuation and the fixing of rates based thereon?

A. There was nothing said about the value.

Cross-examined by Mr. Patterson:

Q. You said you don't think there was anything said about weight. Were you there all the time these two men were together?

A. Yes sir.

Q. Weren't you in the car while they were not there—when you were running your hand over the colt?

A. Mr. Mitchell was in the car with me when I was in there.

149 Q. Was there any time when you were not with the two men when they were together?

A. Not to my knowledge.

Q. At this length of time you are not able to say? There might have been some conversation about weight that you did not hear?

A. Well, my hearing is pretty good.

The Court:

Q. He wants to know whether or not they were out of your presence at any time?

A. No.

Mr. Patterson:

Q. Have you given any thought as to whether or not there was any conversation as to weight since this matter until yesterday and today?

A. I haven't thought very much about the weight.

Q. There is nothing that would serve to recall any conversation about the weight now excepting as you have heard it testified here in court?

A. No, only as I remember it myself.

Q. There would be nothing to keep such a conversation in your mind for that length of time?

A. Yes, because I was interested in the shipment.

150 Q. Have you any way of fixing it by which you can tell us why you can recollect there was nothing said about the weight?

A. No, I haven't any way.

Q. Weren't you in the car while Giffin and Mitchell — signing the contract?

A. No sir.

The Court:

Q. Did you see Mr. Mitchell sign the contract?

A. Yes sir.

By Mr. Patterson:

Q. Were you right beside him?

A. I don't know whether I was still beside him. I was right near him.

Q. How far away from them were you?

A. I can't say the exact distance.

Q. As far as you are from me—say fifteen feet?

A. No sir.

Q. Five feet?

A. No sir.

Q. If you were so close to them why couldn't you identify Mr. Giffin—if you were so close to them as to recollect all that was said and done?

151 A. Some people change in that length of time, and Mr. Giffin has changed some in looks.

W. M. GIFFIN, recalled for cross-examination by Mr. Rilling:

Q. Didn't you have a mustache at the time this contract was signed?

A. I did.

By Mr. Patterson:

Q. Is your hair about the same way it was then?

A. No, I have lost a good deal since then.

Proofs Closed.

Recess taken until two p. m.

152

*Charge to the Jury.*

BENSON, J.:

Gentlemen of the jury: In this case that you are sworn to try the United States Horse-Shoe Company is the plaintiff and the American Express Company is the defendant. The case is brought to recover damages which the plaintiff claims to have sustained

by reason of an injury to a colt which the defendant Company had accepted for transportation, in the City of Milwaukee to be transported to the City of Erie. The accident or injury to the colt the plaintiff claims happened on account of the negligence of the defendant Company.

Negligence is defined in the law to be the absence of ordinary care according to the circumstances; and ordinary care is that care which an ordinarily prudent and careful man would exercise, under similar circumstances and conditions, in a matter of importance to himself.

The evidence tends to show that the plaintiff, the United States Horse-Shoe Company, is a corporation engaged in the manufacture of horse shoes, with a plant located in the City of Erie; and in connection with this business and as a means of further advertising their goods they have created and maintained a stable of race horses, and in creating this stable they purchased certain horses in different parts of the country.

53 Sometime in the year 1912 they purchased in the City of Milwaukee a mare with foal. The colt in question, according to the testimony, was foaled on the 25th day of May 1912, and the mare and colt were taken in charge by some parties near the city of Milwaukee and kept by them until sometime in August 1913, when the plaintiff sent Mr. Mitchell, a horse trainer, to the City of Milwaukee to get this mare and colt and bring them, by way of the American Express Company, to the City of Erie. Upon his arrival in Milwaukee Mr. Mitchell made arrangements for a car, with the defendant Company, and then had the mare and colt brought from the place where they were being kept to the Northwestern Railroad depot, where they were loaded into a car provided by the defendant Company. The rate named in the contract for the conveyance of these horses to Erie was seventy-five dollars,—based, as is explained in the evidence, on the fact that the colt was billed at the weight of 500 lbs. It was afterwards changed or fixed at 300 lbs. weight which materially reduced the charges, and a bill was rendered to the plaintiff Company, for the transportation, for the sum of sixty-nine dollars. This was paid by the plaintiff.

The horses arrived in the City of Erie on Sunday August 24th 1913. Mr. McElroy the President of the plaintiff Company had received a telegram from Mr. Mitchell, sent from Cleveland notifying him that the horses would arrive in Erie at about that  
54 time.

His testimony is that on the morning of the 24th of August he called up the American Express Company and notified them that he would be unable to accept delivery of the horses on that day, and that he would not be able to receive the horses until the following day, which would be the 25th of August 1913. Upon the arrival of the horses in the City of Erie they were unloaded by the employees of the defendant Company and given in charge to the attendants of a livery barn denominated in the evidence as the



Woods barn, located somewhere on Fifteenth Street south of the Union depot.

Mr. Mitchell, who had accompanied the horses from Milwaukee to Erie, followed the horses to the barn. He states that they were taken in and down a run-way or channel into a basement or cellar of the barn and placed in some stalls on one side of the barn. The evidence tends to show that this basement was very dark, and that there was some unevenness in the floor. He testifies to a board being missing in part of the floor back of the stall in which the colt was kept.

On the morning of the 25th of August Mr. McElroy went to get the horses; receipted for them at the Express Office, and then went to the barn; the mare was brought out, which he testifies was in good condition, but that when the colt was brought out of the cellar it was going on three legs, one hip having been broken and crushed. He also speaks about the whirl-bone being broken. Not

ing the condition of the colt he refused to accept it. 155 Elviage, a veterinary surgeon of the City was called (but it is not shown by whom he was called) and he took the colt to his stable in the City of Erie for treatment. According to his testimony the cartilage or muscle covering the ilium bone was rubbed broken off. (I think the horse was taken, instead of to Dr. Elviage's, to Dr. Mitchell's barn). Dr. Elviage states that this injury to the horse would render it practically useless for the purpose for which the horse was bought or reared by the plaintiff; that it could only use the colt could be put to would be some slow work as a working horse, but that it never could develop into a race horse on account of the injury it had received.

The injury is also testified to by several other witnesses on behalf of the plaintiff, and some of them who were familiar with race horses and have had considerable to do with them state this injury would render the colt wholly useless as a race horse.

As to the condition of the stable you have the testimony of Mr. McElroy who went there on the morning of August 25th, on Monday morning, the day after the receipt of the horses in the City of Erie, and he testifies to the condition that he found the stable in and stated that it was unfit and unsafe for the purpose of keeping horses in. He went to the stable again on the 20th of October

the same year, with some other parties. He testifies that 156 conditions on the 20th of October 1913 were practically the same as they were on the 25th of August 1913; and several men who went there with him and who appear as witnesses in the case testify to the conditions they found existing there at that time. If I recall the testimony correctly one of those witnesses testified to the fact that a board or some part of the partition of the stable was loose and stuck out into the stall; they they found broken boards or planks in the floor of the stable, and they all give in their opinion (being horsemen and having had to do with horses and acquainted with the nature and method of taking care of horses) that the place was an unsafe and unfit place for horses.

When a common carrier accepts horses or other things for trans-

portation the law requires that they use reasonable diligence and care toward the protecting and safeguarding of those things which are in their care, during transportation, or until the time that they are delivered to the consignee. When a horse or other article is delivered to a common carrier the control over that horse is taken away from the owner or shipper or consignor and given into the charge of the common carrier, and they having the care of it and supervision over its transportation, are bound by the law to exercise such care and diligence as will reasonably protect the horse or other article in their charge from injury or damage; and if during  
157 the transportation any injury or damage befalls the article the presumption of the law is that that injury is due to the neglect and negligence of the common carrier. This presumption, however, is not conclusive. The common carrier may rebut it by showing circumstances that would negative it: by showing that they had exercised reasonable care over the article or object, and that the injury received was not due to any act of theirs or on account of any negligence on their part or through the agency of any car or stable over which they had control. So, gentlemen of the jury, it is for you to say in this case, first, whether or not the defendant Company, under the circumstances, did exercise such care and protection over this colt as the law requires; that is, reasonable care. They are not held to the highest degree of care. They are not bound to anticipate any extraordinary occurrences that might lead to damage or injury to the horse. They must, however, in the exercise of care and prudence, take into consideration the character of the object that they are transporting. If it be a horse they must guard against everything which might lead to an injury to that horse, growing out of the ordinary habits of a horse; they would not be held to provide against the acts of a vicious or ugly-dispositioned horse. They are only held to the ordinary disposition of horses, generally,—not of the highest nor yet of the lowest. As bearing upon the dis-  
158 position of this colt you have the fact that it was driven or led from the farm located near Milwaukee into the City of Milwaukee, that it was there loaded into a car for transportation, without trouble; that it was again unloaded from the car at Chicago and transferred, by being led, to another railroad in another part of the city and there again loaded into a car in which it was conveyed to the City of Erie; that during all of this transportation by rail and this handling the colt had done nothing through which it had received any injury. You have also the testimony of the employees of the defendant Company who were present at the time that the colt was unloaded from the car, in the City of Erie, that he came out quietly and carefully and that they had no trouble whatever in unloading him, and that he was led again from the car to this stable. All of these facts gentlemen of the jury bear upon the character and disposition and individuality of the colt, and are to be taken into consideration in weighing the facts in this case, in determining by whose fault the colt was injured. There is no evidence produced in court as to how this injury was received; but we say to you as a matter of law that the presumption is that it was through the negli-

gence of the defendant, and that presumption carries until they controvert it by evidence, or circumstances growing out of the case that

would negative any negligence on their part or on the part of those who were caring for the horse, under their direction.

The horse was not delivered, in law, to the consignees, the United States Horse-Shoe Company, until the delivery was made and attempted to be made on the morning of the 25th of August, Monday morning. While the defendant Company under their contract possibly could have left the horses in the car until they were taken and unloaded by the consignee, yet they did not choose to do that and unloaded them themselves and put them in a barn of their own choosing and not under the direction of the owner.

There is some testimony on the part of the defendant that Mr. McElroy directed them to put them in a stable, but there is no evidence that he told them what stable or where to put them, and we do not think that that direction would amount to a delivery in law, or an acceptance of the colt by the plaintiff.

If under all the evidence you find that the plaintiff is entitled to recover in this case then you take up the question of the value of the horse to the plaintiff, as a probable racing horse. The evidence of Mr. McElroy is to the effect that the colt was worth from three to five thousand dollars. The evidence of Mr. Mitchell, who is a horse trainer and who had been engaged in the race-horse business for

good many years and is familiar with the pedigree of horses and their possibilities, places a value of from three to five thousand dollars.

You have also the testimony of Mr. Seftel who sold the mare to the plaintiff and who is also familiar with the breeding of horses, that the value of the colt was from thirty-five hundred to five thousand dollars perhaps—you will remember his testimony. You heard the testimony regarding the pedigree of the colt; it would seem to be of a very classy character, coming from a long line of illustrious racing horses. It is true that the colt had not arrived at that age where it would have manifested any racing propensities, yet in the character of that business, perhaps as a prospective race horse, with that pedigree, he might have a very high value. So long as the matter has been brought out as to the matter of the claim, both by plaintiff and the defendant, in remarks on both sides it might be well to state that in filing the claim for this horse the amount was fixed at three thousand dollars. That would be strong evidence of the amount that the plaintiff fixed as the value of the colt at the time of the beginning of this suit; it is not likely that they would fix the value at less than they really thought the horse was worth; however, you are not to be guided by anything that is in the declaration; you are to find your verdict, if you find for the plaintiff, entirely from the evidence, disregarding the claim in the declaration. You have heard all of the testimony regarding

the colt; as to its probabilities of developing into a speed horse, and the jury from that evidence are probably capable of fixing the value, and it is your duty to do so. You might find that notwithstanding the evidence fixes a very high value on the horse

that it was not worth that amount of money, and you should use your own judgment upon that question—based upon the testimony.

But, gentlemen of the jury, first take up the question as to whether or not the injury to this colt was brought about by the negligence of the defendant. If they did all that was required, all that would be expected under circumstances of this kind then they did their whole duty. They would not be liable for any injury occasioned by any act of the horse itself that could not have been avoided by them by the use of reasonable care. They would not be liable for a mere accident such as the slipping on the floor or falling: they would only be held responsible for such injuries as were occasioned by the lack of ordinary care.

You will remember all of the testimony of all of the witnesses, whether referred to by the Court or not. It is the duty of the jury to pass upon all of the evidence, and the weight that is to be given to the evidence. You should be fair in your judgment upon the case: you should not be guided by sympathy or prejudice,  
 162 but you should decide the case as between man and man, holding the scales of Justice equally poised between the parties.

If you find for the defendant you would return a verdict for the defendant; if you find a verdict for the plaintiff you should name the amount that he is entitled to recover; that is, the damage that they have sustained. In case you return a verdict for the plaintiff you should say "We find for the plaintiff,"—in a certain sum. If you find for the defendant your verdict should be "We find for the defendant."

The defendant has submitted certain Points, which we will not read, inasmuch as they are all refused.

Before verdict and before the jury retire to consider upon their verdict counsel for defendant excepts to the charge, generally, and also to the answer to defendant's Points, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.

PAUL A. BENSON, J. [SEAL.]

163 Also before verdict and before the jury retire defendant's counsel requests that the charge of the Court and the Points and answers thereto be reduced to writing from the Stenographer's Notes and filed of Record, which request is granted.

Defendant's counsel also excepts specifically to the charge of the Court, as follows:

164 Defendant counsel, before the jury retires, excepts to the charge of the court in the following particulars:

To such remarks as the court made in his charge to the jury with reference to a board being missing behind the stalls, and to a board being loose, and broken boards being behind the stalls, as having been testified to by Mr. Mitchell; to such portion of the charge as instructs the jury that if during transportation any injury occurs to the animal or article transported, a presumption of law arises that

such was due to the fault of the carrier; to such portions of the charge as instruct the jury that a carrier must guard against any accident growing out of the ordinary habits of the animals to be transported; to such portions of the charge as instruct the jury that a presumption of negligence arises as a matter of law from the happening of an accident to the colt during transportation; to such portions of the charge as instruct the jury that the direction to deliver the horses to the stable was not a delivery fulfilling the obligations of the defendant.

And defendant excepts generally to the charge as magnifying the plaintiff's testimony in contradistinction to that of the defendant, and to the quoting of the plaintiff's witnesses without quoting the testimony of the defendant's witnesses to the contrary; and to the charge as a whole as being unduly favorable to the plaintiff; and to the refusal of the court to charge as requested in the points presented by the defendant, Nos. 1 to 6.

Exception sealed for defendant before verdict and before the jury retired to consider upon their verdict.

Before verdict and before the jury retired to consider upon their verdict plaintiff excepts to the charge of the court, and requests that the charge of the court and the points and answers thereto be reduced to writing from the stenographer's notes and filed of record, which request is granted, and an exception sealed before verdict and before the jury retired to consider upon their verdict. Before verdict and before the jury retire to consider upon their verdict plaintiff's counsel excepts generally to the charge of the Court, and exception is accordingly sealed for the plaintiff, before verdict and before the jury retire.

PAUL A. BENSON, J. [SEAL.]

Also before verdict and before the jury retire plaintiff's counsel request that the charge of the Court and the Points and answers thereto be reduced to writing from the Stenographer's Notes and filed of Record, which request is granted.

The Points submitted by defendant, which were refused, but not read, being as follows:

1. Under all the evidence and the pleadings the verdict must be for the defendant.

2. The shipment of the mare and colt having been made under a written contract, required by the laws of the United States, and being interstate in character, the plaintiff in no event can recover more than the sum of \$50.00 with lawful interest thereon from the date of the injury and it is immaterial whether or not the figures of \$50.00 were written in their proper place, in the live-stock contract; it appearing that the expressage charged and paid was based upon a valuation of \$50.00 for the animal carried, in accordance with the rates and schedules filed by the defendant Company with the Interstate Commerce Commission, and in force and effect at the time the shipment was made.

3. The shipper who was the agent of the plaintiff and whose contract the plaintiff has adopted, not having at the time of the live

contract declared any value upon the colt in excess of \$50.00, expressage having been charged and paid for the carriage of the colt, based upon a valuation on it of that sum, the plaintiff in no event can recover more than \$50.00, with interest thereon. Such sum of \$50.00 being the basis of calculating charge for the carriage of the colt from Milwaukee, Wis. to Erie, in accordance with the rates and schedules filed by the defendant company with the Interstate Commerce Commission, in accordance with law, and in force and effect at the time the shipment was made. It was the duty of the plaintiff, through its agent Mitchell, to declare the value of the colt at the time it was offered for shipment, and not having declared any value in excess of \$50.00 it is immaterial that the blank spaces provided in the live stock contract for declaration of value are unfilled, and express charges for the transportation of the colt from Milwaukee, Wis. to Erie, Pa., having been charged and paid upon the basis of \$50.00 as a valuation in accordance with the rates and schedules filed by the defendant Company in accordance with law and in force and effect at the time the shipment was made, the plaintiff's recovery in any event is limited to the sum of \$50.00, with interest thereon, from the date of the accident.

5. The plaintiff is charged by law with a knowledge of the rates and schedules of the defendant properly filed with the Interstate Commerce Commission which were in force and effect at the time the transaction took place so far as they effect the carriage of the animals. The failure of the plaintiff's agent to declare any value upon the colt in excess of \$50.00 limits the recovery of the plaintiff, in any event, to the sum of \$50.00 with interest thereon, under the pleadings and all the evidence.

6. The plaintiff must show by the fair weight of the evidence that the injury suffered by the colt was due to the negligence of the defendant, and if the injury suffered was caused by any action of the animal itself due to its natural propensities, and not to the negligence of the defendant, then the verdict of the jury must be for the defendant.

I hereby certify that the proceedings, evidence and charge, are contained fully and accurately in the notes taken by me at the trial of the above cause, and that this copy is a correct transcript of the same.

RALPH B. STERRETT,  
*Official Stenographer.*

The foregoing record of the proceedings upon the trial of the above cause is hereby approved, and directed to be filed.

PAUL A. BENSON, *Judge.*

Endorsement: No. 29, May Term 1914—U. S. Horse-Shoe Co. vs. American Express Co.—Stenographer's Copy—Filed Court Common Pleas Erie Co. Mar. 29, 1915.—I. E. Briggs, Erie, Pa.



Section 11, page 8, of Supplement No. 11 to Official Express Classification No. 21.

*Valuation Charges.*

(a) The rates governed by this Classification are based upon a value of not exceeding \$50.00 on each shipment of 100 lbs. or less, and not exceeding 50 cents per pound, actual weight, on each shipment weighing more than 100 lbs., and the liability of the express company is limited to the value above stated unless a greater value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under the schedule of charges for excess value in paragraph (c) of this rule.

(b) When the shipment is accompanied by an invoice the value shown by the invoice must be considered the value of the shipment, unless a higher value is declared by the shipper.

(c) When the value declared by the shipper, or indicated by an invoice, exceeds the value of \$50.00 on a shipment weighing 100 lbs. or less, or 50 cents per pound on a shipment weighing more than 100 lbs., a charge for the excess value must be made according to the following schedule of charges:

When the merchandise rate is \$3.00 or less per 100 lbs. 10 cents for each \$100 excess value or fraction thereof.

When Merchandise rate exceeds \$3.00 and not more than \$8.00 per 100 lbs., 15 cents for each \$100 excess value or fraction thereof.

When Merchandise rate exceeds \$8.00 per 100 lbs., 20 cents for each \$100 excess value, or fraction thereof.

(d) These charges must not be applied to Live Animals, Live Birds or Live Stock (see paragraph g), to Paintings or Statuary valued at more than \$500.00 (see paragraph f), nor to Shipments of Bonds, Securities or Money (except nickel or copper coins).

(e) When the weights of separate packages are aggregated under Rule 9, the declared or invoice values of the separate packages must also be aggregated and if the value so ascertained exceeds \$50.00 for 100 pounds weight or less, or 50 cents per pound when the weight exceeds 100 pounds, additional charge for the excess value must be assessed as provided in paragraphs (a) and (c). In arriving at the excess value provided for herein, packages weighing less than 20 pounds must be estimated at 20 pounds.

If in the aggregation of values one or more packages bear no value or are not accompanied by invoices no value as to those will be considered.

(f) Valuation charges on Paintings and Statuary.

When the declared value of a shipment of Paintings or Statuary does not exceed \$500.00, it may be receipted for on regular form of receipt and the charge for value in excess of \$50.00 must be made in accordance with paragraphs (a) and (b).

When value declared exceeds \$500.00, Paintings or Statuary must be accepted only under special contract, and the charge for value in excess of \$50.00 up to and including \$500.00 must be made in accordance with paragraphs (a) and (b), in addition to the charge for value in excess of \$500.00, which must be made on the following basis:

When merchandise rate per 100 lbs. is —.	The charge for each \$100 value (or fraction thereof) in excess of \$500.00 must be —.
\$1.00 or less .....	\$0.25
over \$1.00 and not over \$3.00 .....	.30
over \$3.00 and not over \$5.00 .....	.35
over \$5.00 and not over \$8.00 .....	.40
over \$8.00 .....	.50

(g) Valuation charges on Live Animals, Live Birds, or Live Stock:

The Classification Rates on Live Animals, Live Birds, or Live Stock apply only when the declared value does not exceed the following:

Horses, Jacks or Mules \$100.00 each.

Bulls, Burros, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Pigs, Sheep, Steers, or Animals not otherwise specified \$50.00 each.

Birds, Cats, Ferrets, Guinea Pigs, Hares, Mice, Opossums, Prairie Dogs, Rabbits, Squirrels, Fancy Pigeons or Fancy Poultry, or other Live Fowls, (except for market), or Reptiles \$5.00 each, but not more than \$50.00 for each shipment weighing 100 lbs. or less and not more than 50 cents per pound actual weight on each shipment weighing more than 100 lbs.

When the Merchandise Rate is over \$3.00 and not over \$5.00 per 100 lbs. an additional charge must be made on the excess value according to the following:

When the Merchandise Rate is not over \$2.00 per 100 lbs. the additional charge will be 1% of the excess valuation.

When the Merchandise Rate is over \$2.00 and not over \$3.00 per 100 lbs. the additional charge will be 1½% of the excess valuation.

When the Merchandise Rate is over \$3.00 and not over \$5.00 per 100 lbs. the additional charge will be 2% of the excess valuation.

When the Merchandise Rate is over \$5.00 per 100 lbs. the additional charge will be 2½% of the excess valuation.

(h) When a shipment is carried by two or more companies the charges for valuation provided in this rate must be computed as follows:

If there is a joint merchandise rate in effect it must be used as the basis.

If there is no joint merchandise rate in effect the sum of the actual Merchandise Rates used in computing the charges for transportation must be used as the basis for the valuation charge.

When the Classification provides rules for the division of the transportation charges the same rules must be used in the division of the rough charges for valuation.



When no rule is provided in the Classification for the division of the transportation charges the valuation charge must be pro-rated on the basis of the Local Merchandise rates of each Company to and from the actual transfer point.

(i) The charges for value must in all cases be based on the regular merchandise rate per 100 lbs., and not upon any reduced rate made for more than 100 lbs."

174 Page 22, Art. 6:

Horses—Single animal must be estimated at 1,000 lbs. . . 3 t Mdse.

Minimum \$25.00. When shipments pass over the lines of two or more Companies, and the shipping point or destination is an exclusive office, through minimum \$37.50. The minimum applies to each horse in the shipment, but the total charge must not exceed the carload rate.

Art. 7. Jacks, Mules, Burros, Ponies, or Colts:

Animals weighing not over 500 lbs. each—

Crated . . . . . Mdse.

Not crated . . . . . 1½ Mdse.

Animals weighing over 500 lbs. each and not over 1,000 lbs. each—

Crated . . . . . Mdse.

Not Crated . . . . . Classify same as a horse

#### Minimum Charges.

For Jacks or mules \$10.00. For Burros, Colts or Ponies, crated \$5.00. When shipments pass over the lines of two or more Companies, and the shipping point or destination is an exclusive office, the through minimum on Jacks or Mules is \$15.00; for Burros, Ponies or Colts, crated, \$7.50.

175 When crated, the minimum applies to each crate, and when not crated to each animal, but the total charge must not exceed the carload rate."

176 January Term, 1915.

94.

UNITED STATES HORSE SHOE COMPANY, Plaintiff,

v.

AMERICAN EXPRESS COMPANY, Defendant.

Appeal of Defendant, No. 29, May Term, 1914, from the Judgment.

Charles F. Patterson.

Appeal from Court of Common Pleas of the County of Erie.

Filed February 23, 1915.

Ex die, Certiorari exit.

Retble. fourth Monday April, 1915.

April 23, 1915.—Record returned & filed.

April 26, 1915.—Assignments of Error filed.

April 26, 1915.—Argued.

July 3, 1915.—Judgment affirmed.

Opinion by Elkin, J.

And now, to wit, July 8, 1915, the Prothonotary of this court is directed to hold the record in this case for sixty days, in order to enable the Appellant the American Express Company, to apply to the Supreme Court of the United States for a Writ of Error.

J. HAY BROWN,  
*Chief Justice.*

177 In the Supreme Court of Pennsylvania for the Eastern District.

Court of Common Pleas, County of Erie, No. 29 of May Term, 1914.

UNITED STATES HORSE SHOE COMPANY  
vs.  
AMERICAN EXPRESS COMPANY.

Enter Appeal on behalf of defendant, American Express Company, from the judgment of the Court of Common Pleas of the County of Erie.

CHARLES F. PATTERSON.  
*Attorney for Appellant.*

COUNTY OF ALLEGHENY, ss:

To Hon. James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania for the Eastern District:

Charles F. Patterson, Attorney for Appellant, being duly sworn, saith that the above Appeal is not intended for delay but because Appellant believes it has suffered injustice by the judgment from which it appeals.

CHARLES F. PATTERSON.

Sworn and subscribed before me this 19th day of February A. D. 1915.

[SEAL.]

PEARL M. MERIT,  
*Notary Public.*

My Commission expires April 1st, 1917.

178 Endorsement: No. 94, January Term, 1915. Supreme Court of Pennsylvania, Eastern District. United States Horse Shoe Company vs. American Express Company. Appeal and Affidavit. Filed Feb. 23, 1915. In the Supreme Court. Charles F. Patterson, Attorney for Appellant, 865 Frick Building Annex, Pittsburgh, Pa.

179 THE SUPREME COURT OF PENNSYLVANIA,  
*Eastern District, City and County  
 of Philadelphia, ss:*

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas, No. —, for the County of Erie, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of American Express Company from the judgment of your said Court at No. 29 of May Term, A. D. 1914, wherein United States Horse Shoe Company was plaintiff and the said appellant was defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the fourth Monday of April next (1915), so full and entire as in your Court before you they remain, you certify and send, together with this Writ that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable J. Hay Brown, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the twenty-third day of February in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.]

ALFRED B. ALLEN,  
*Deputy Prothonotary.*

180 To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, Sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

EMORY A. WALLING, P. J. [L. S.]

Endorsement: No. 29, May Term, 1914. C. P. Erie Co. No. 94, January Term, 1915. Supreme Court. United States Horse Shoe Company v. American Express Co., Appellant. Certiorari to the Court of Common Pleas No. — for the County of Erie. Returnable the fourth Monday of April, 1915. Rule on the Appellee to appear and plead on the Return day of the Writ. Alfred B. Allen, Deputy Prothonotary. Charles F. Patterson. Filed Court Common Pleas Erie Co., Pa., Feb. 25, 1915. Filed Apr. 23, 1915, in Supreme Court.

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Copy.

In the Supreme Court of Pennsylvania, Eastern District.

No. 94, January Term, 1915.

UNITED STATES HORSE SHOE COMPANY

vs.

AMERICAN EXPRESS COMPANY, Appellant.

*Assignments of Error.*

On this 29<sup>th</sup> day of July, 1915, comes the American Express Company, Appellant in the Supreme Court of Pennsylvania and Plaintiff in Error in the Supreme Court of the United States, by Charles F. Patterson, its attorney, and says that in the record and proceedings, decision and final judgment of the Supreme Court of Pennsylvania in the above entitled matter there is manifest error in this to-wit:

First. The Supreme Court erred in affirming the judgment and overruling Appellant's Second Specification of Error, which was as follows:

"2nd. The Court erred in refusing to charge the jury as requested by the defendant in its second point, which point and answer thereto are as follows:

'2. The shipment of the mare and colt having been made under a written Contract, required by the laws of the United States, and being interstate in character, the plaintiff in no event can recover more than the sum of \$50.00, with lawful interest thereon from the date of injury, and it is immaterial whether or not the figures of \$50.00 were written in their proper place in the live stock contract, it appearing that the expressage charged and paid was based upon a valuation of \$50.00 for the animal carried in accordance with the rates and schedules filed by the defendant company with the Interstate Commerce Commission, and in force and effect at the time the shipment was made. Refused.'

'Before verdict and before the jury retire to consider upon their verdict counsel for defendant excepts to the charge, generally, and also to the answers to defendant's points, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.'

PAUL A. BENSON, J."

And the said American Express Company in support of said Assignment of Error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce, and its amendments and supplements, and in particular of Section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and

Statutes of and authority exercised under the United States, specially set up and claimed by the said American Express Company.

Second. The Supreme Court erred in affirming the judgment and overruling Appellant's Third Specification of Error, which was as follows:

"3rd. The Court erred in refusing to charge the jury as requested by the defendant in its third point, which point and the answer thereto are as follows:

"3. The shipper who was the agent of the plaintiff and whose contract the plaintiff has adopted not having at the time of the execution of the live stock contract declared any value upon the colt in excess of \$50.00 and expressage having been charged and paid for the carriage of the colt, based upon a valuation on it of that sum, the plaintiff in no event can recover more than \$50.00, with interest thereon. Such sum of \$50.00 being the basis of calculating the charge for the carriage of the colt from Milwaukee, Wis., to Erie, Pa., in accordance with the rates and schedules filed by the defendant company with the Interstate Commerce Commission in accordance with law, and in force and effect at the time the shipment was made. Refused.'

'Before verdict and before the jury retire to consider upon their verdict counsel for defendant excepts to the charge, generally, and also to the answers to defendant's points, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.'

PAUL A. BENSON, J."

And the said American Express Company in support of said Assignment of Error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of Section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of and authority exercised under the United States specially set up and claimed by the said American Express Company.

183 Third. The Supreme Court erred in affirming the judgment and overruling Appellant's Fourth Specification of Error, which was as follows:

"4th. The Court erred in refusing to charge the jury as requested by the defendant in its fourth point, which point and the answer thereto, are as follows:

"4. It was the duty of the plaintiff through its agent Mitchell to declare the value of the colt at the time it was offered for shipment, and he not having declared any value in excess of \$50.00, it is immaterial that the blank spaces provided in the live stock contract for the declaration of value are unfilled, and the express charges for the transportation of the colt from Milwaukee, Wis., to Erie, Pa., having been charged and paid upon the basis of \$50.00 as a valuation in accordance with the rates and schedules filed by the defendant

company in accordance with law and in force and effect at the time the shipment was made the plaintiffs recovery in any event is limited to the sum of \$50.00 with interest thereon from the date of the accident. Refused.'

'Before verdict and before the jury retire to consider upon their verdict counsel for defendant excepts to the charge, generally, and also to the answers to defendant's points, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.'

PAUL A. BENSON, J."

And the said American Express Company in support of said Assignment of Error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of Section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of and authority exercised under the United States specially set up and claimed by the said American Express Company.

Fourth. The Supreme Court erred in affirming the judgment and overruling Appellant's Fifth Specification of Error, which was as follows:

"5th. The Court erred in refusing to charge the jury as requested by the defendant in its fifth point, which point and the answer thereto, are as follows:

"5. The plaintiff is charged by law with a knowledge of the rates and schedules of the defendant properly filed with the Interstate Commerce Commission which were in force and effect at the time the transaction took place, so far as they effect the carriage of the animals. The failure of the plaintiff's agent to declare any  
184 valuation upon the colt in excess of \$50.00 limits the recovery of the plaintiff in any event to the sum of \$50.00 with interest thereon under the pleadings and all the evidence. Refused.'

'Before verdict and before the jury retire to consider upon their verdict counsel for defendant excepts to the charge, generally, and also to the answers to defendant's points, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.'

PAUL A. BENSON, J."

And the said American Express Company in support of said Assignment of Error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of Section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and

Statutes of and authority exercised under the United States specially set up and claimed by the said American Express Company.

Fifth. The Supreme Court erred in affirming the judgment and overruling Appellant's Sixth Specification of Error, which was as follows:

"6th. The Court erred in sustaining the objection of the plaintiff to the offer of the defendant to prove that the figures '\$50.' and '\$100.00' were inserted in the wrong place in the live stock contract in the haste of the moment at the time the contract was signed, such offer and the ruling of the Court thereon being as follows, W. M. Gillin, a witness ex parte defendant, being on the stand, was asked the following question:

'Q. In this contract, opposite the words, 'For Horses, Jacks or Mules,' in Section 3, is written \$100. State how and under what circumstances you happened to write those particular figures in that particular contract?'

Objected to as incompetent, irrelevant and immaterial; it seeks to change the written contract.

By Mr. Patterson: The purpose is to show that these words were written in error in the wrong place in the contract, to be followed by evidence showing what the rates were filed with the Commission for those values.

By the Court: I don't think it is proper unless they show that they advised Mr. Mitchell of that mistake at the time. If that knowledge was brought to Mr. Mitchell before the articles were shipped it might be competent.

185 By Mr. Patterson: We propose to prove by the witness on the stand that at the time the live stock contract was signed by Mr. Mitchell and by himself as agent for the Express Company that a conversation took place the substance of which was that the rate of expressage charges varied with the values fixed upon the animals; that the minimum valuation upon which the rates were based was \$100.00 for a horse and \$50.00 for a colt, and that the witness now upon the stand, in the haste of the moment, inserted the words \$100.00 opposite the words 'For Horses, Jacks, etc.' and the words \$50.00 opposite the words 'bulls, colts, etc.' instead of inserting such values in Section 5 of said contract opposite the words 'Number and Kind, Value each,' so many dollars. This for the purpose of proving that the figures were inserted in the wrong place in the contract in error by the mistake of the witness; to be followed by proof that the rates charged the shipper and consignee were based upon those valuations in accordance with the rates and schedules filed with the Interstate Commerce Commission by the Company.

The offer is objected to as incompetent, irrelevant and immaterial. It seeks to vary or alter the terms of a written instrument, the bill of lading, upon which the defendant company accepted these horses for shipment and forwarded them.

By the Court: As the proposition stands the objection is sustained and exception sealed for the defendant. If they can show further that the mistake was understood, that the real facts were understood by both the shipper and the defendant, it might be a different proposition."



And the said American Express Company in support of said Assignment of Error claim that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of Section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of and authority exercised under the United States specially set up and claimed by the said American Express Company.

Sixth. The Supreme Court erred in affirming the judgment and overruling Appellant's Seventh Specification of Error, which was as follows:

"7th. The Court erred in sustaining the objection of the plaintiff to a question asked W. M. Giffin, a witness for the defendant, to the effect that the figures '\$50.00' and '\$100.00' had been inserted in mistake in the contract and why they had been inserted, such question and the ruling of the Court thereon being as follows, W. M. Giffin, a witness ex parte defendant being on the stand and being engaged in explaining the circumstances under which the live stock contract had been executed was asked the following question, which was objected to and the objection sustained:

186 'Q. Will you state why these figures were inserted in the places in which they now are in the contract instead of being inserted in their proper place in Schedule 5?"

Objected to as incompetent, irrelevant and immaterial, and seeks to vary or alter the terms of the written instrument on which this defendant company accepted the horses for shipment.

Objection sustained and exception sealed for the defendant."

And the said American Express Company in support of said Assignment of Error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of Section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of and authority exercised under the United States specially set up and claimed by the said American Express Company.

Wherefore, for these manifest errors appearing in the record, the said American Express Company, Appellant in the Supreme Court of Pennsylvania and Plaintiff in Error in the Supreme Court of the United States, prays that the judgment of the said Supreme Court of Pennsylvania be reversed and set aside and that judgment be rendered granting it its rights under the Constitution, Statutes and laws of the United States.

CHARLES F. PATTERSON,  
*Of Counsel for American Express Company.*



[Endorsed:] Filed Jul- 30, 1915, in the Supreme Court.

187 In the Supreme Court of Pennsylvania, Eastern District,  
January Term, 1915.

No. 94.

UNITED STATES HORSE SHOE COMPANY

v.

AMERICAN EXPRESS COMPANY, Appellant.

Appeal from the Judgment of the Court of Common Pleas of Erie  
County.

Filed July 3, 1915.

ELKIN, J.:

Plaintiff delivered a mare and colt to defendant at Milwaukee, Wisconsin, to be forwarded by express to Erie, Pennsylvania. The animals arrived at the point of destination on Sunday, were unloaded and placed in the basement of a barn by the Express Company for safe keeping until Monday, when delivery was tendered to the consignee. When delivery was tendered it was discovered that the colt was severely injured, its left hip having been smashed and broken during the night while it was lodged in a roughly constructed stall in the basement of the barn. It is conceded that the colt, which came of a celebrated strain of highly bred horses, had but little if any value after the injury. Plaintiff declined to accept delivery of the colt because of its injured condition and brought this action to recover damages on the ground of negligence. The jury found in favor of the plaintiff for the value of the colt, and appellant complains of errors alleged to have been committed at the trial.

The first contention pressed upon our attention is that  
188 there was not sufficient evidence of negligence to warrant a submission of the case to the jury. It is strongly urged by learned counsel for appellant that there was no direct evidence as to how the accident occurred, nor to indicate how the hip bone was broken, nor to show that the colt had stepped into a hole in the runway behind the stall, nor any other testimony from which it could be reasonably inferred that the proximate cause of the injury was anything done or left undone by the Express Company. It is true there was no direct evidence as to what caused the accident, but we cannot agree that there was no testimony upon which to base a finding of negligence in taking care of the colt. The Express Company had charge of the colt when it was injured; it selected the barn where the colt was kept temporarily during the night; the place thus selected must be regarded as an instrumentality under the control of the forwarding company for the purpose of making delivery; and when so considered it was for the jury to say whether it was reasonably safe for the purpose intended in the light of the evidence as to the condition of the basement. Several witnesses testi-

fied that the colt was put and kept in an unsafe and improper place, and one at least stated that there was a hole in the floor into which the colt might have stepped. The injury was of such a nature that it could not have resulted from natural causes, and in our opinion the evidence was sufficient to warrant an inference that the unsafe condition of the stall and basement was the proximate cause of the accident. In the case of animate property the injury may be of such a nature as to indicate violent or careless handling in course of transportation, and where the facts are sufficient to warrant such an inference, the question may very properly be submitted to the jury:

Blackburn v. Adams Express Co., 43 Pa. Sup. Ct. 276. It  
189 has been held in many cases that the mere happening of an injurious accident in the course of transportation raises, prima facie, a presumption of negligence, and throws upon the carrier the onus of showing that it did not exist: Delmont v. Adams Express Co., 53 Pa. Sup. Ct. 506. In the case at bar the accident was an injurious one, and the injury of such a nature as to preclude the probability of its having resulted from natural causes. These facts clearly distinguish the present case from Penna. R. R. Co. v. Raiordon, 119 Pa. 577, so strongly relied on by appellant. But even in that case this court clearly stated the rule applicable to injurious accidents as contradistinguished from injuries resulting to property in transit where there is no evidence of what caused the accident and nothing to indicate any defects in the instrumentalities of transportation.

We cannot agree with learned counsel for appellant that the testimony of the so-called expert witnesses should have been excluded. These witnesses described the condition of the basement of the barn in which the colt was kept and expressed their opinion that it was not a safe and proper place for stalling purposes. We can see no valid reason why such testimony should be excluded. These opinions were based upon conditions which the witnesses saw and afterwards described for the information of the jury who passed upon the value of the testimony. If any authority is needed to sustain these offers of testimony it will be found in Schaeffer v. Railroad Co., 168 Pa. 209. As to the negligence of the defendant company, the case was for the jury, and we find no reversible error in the instructions complained of, nor in the manner of submission.

The main contention of appellant is that in the light of the Federal decisions the amount recovered should have been limited  
190 to \$50.00. In other words that this is a case of limited liability, the amount to be determined upon the basis of the rate charged. It is urged, and with much force, that the plaintiff was bound by the rates and schedules filed by defendant with the Interstate Commerce Commission, and that the shipper not having declared any valuation at the time of shipment and having paid to the Express Company a charge based upon a minimum valuation of \$50.00, is thereby precluded from recovering upon the basis of the actual value of the colt. This raises an interesting question and one as to which we are in some doubt. The Federal decisions control, and if the question had been passed upon in that jurisdiction in a

case where the facts are the same as here presented, it would be necessary to accept that authority as final and conclusive. We entirely agree with learned counsel for appellant that under the decisions of the Supreme Court of the United States construing the Federal statutes a common carrier may limit its liability on interstate shipments even as against its own negligence: *Adams Express Co. v. Croninger*, 226 U. S. 491. As applied to the facts of the present case, it is not a question of the right of appellant to limit its liability but whether it did so in fact. It is conceded by both parties to the controversy here that the shipper was not asked to and did not declare any value on the colt. Appellant contends that this makes no difference because the shipper is charged with knowledge that the rate of carriage is based upon the declared or assumed value of the article shipped, both from the bill of lading and from the schedule of rates filed with the Interstate Commerce Commission, and that the effect of the filing of the schedules makes the published rates binding upon shipper and carrier alike. To sustain

191 these contentions the following cases are cited: *Boston and Maine R. R. Co. v. Hooker*, 233 U. S. 97; *Santa Fe Railway Co. v. Robinson*, 233 U. S. 173; *Pierce v. Wells Fargo & Co.*, 236 U. S. 278. These cases and others of like import do sustain the general propositions of law relied on by appellant in the present case. While this is true we cannot regard them as necessarily binding and conclusive under the facts disclosed by this record. The schedule of rate was not published at Milwaukee, where the colt was received for shipment, at least there was no evidence to show such publication, and counsel for appellant seems to concede this as a fact in the argument of his case. The only contention made here in this respect is that the rates were filed with the Interstate Commerce Commission at Washington, and that this was a sufficient compliance with the law to charge the shipper with notice. The Act of Congress of June 29, 1906, known as the Carmack Amendment, provides *inter alia* as follows: "Such schedule shall be plainly printed in large type and copies for the use of the public shall be posted in two public and conspicuous places in every depot or office of such carrier where passengers or freight respectively are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected." This is a most important provision of the statute, and as we view it, the burden was on the defendant express company to prove that the required publication was made, if its purpose was to charge plaintiff with notice of the published rates and conditions upon which the colt was received for shipment. No case has been called to our attention, and we

know of none, in which it has been held that a carrier may  
192 disregard the provisions of the Act relating to publication of the schedules and still be entitled to every benefit that results from a proper compliance with the law. Under the facts of the case at bar we are of opinion that the shipper was not charged with notice of the valuation upon which the rate of carriage was based by anything which may have appeared in the schedule filed

th the Interstate Commerce Commission, but which was not posted the place of shipment as required by the Federal statute. This brings us to a consideration of what may be deemed the controlling question in the case. Did the bill of lading or the contract shipment between the parties limit the liability of the Express company to \$50.00 as the value of the colt? The rate charged was based upon this valuation, but the shipper did not declare that or any other value, and had no actual notice of the intention of appellant to limit its liability in this manner. It is contended for appellant that the contract of shipment gave the shipper notice that the actual value must be declared, and that failure to so declare gave the carrier the right to base the rate of carriage upon the minimum valuation fixed in the schedule of rates, and this having been done, the liability for loss or damages was likewise limited. We are not convinced that the cases relied on to sustain this contention are authority for the doctrine so broadly stated. The duty of the shipper to declare a value should be no greater than that of the carrier to ask such valuation to be declared. If both parties failed to observe the requirements of the rule, it would seem to be unfair to visit the consequences upon one of them only. Appellant cites *Great Northern Railway Co., v. O'Connor*, 232 U. S. 508, to sustain its position in the present case. In that case the Supreme Court of the United States said *inter alia*: "If no value is stated the tariff rate applicable to such a state of facts applies. If, on the other hand, there are alternative rates based on value and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value." In the case at bar there were alternative rates based upon valuation, but the shipper did not declare a value to secure a lower rate, nor for any other purpose, so far as the record disclose. It is therefore fair that the excerpt from the opinion just quoted, which reads and is sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value," has no application to a case in which the value has not been declared. Again, in construing the bill of lading due regard must be had for the schedule of rates upon which it was based. Under the head of "Valuation Charges" there are several paragraphs relating to rates and classification. In paragraph (a) it is provided that "the liability of the express company is limited to the value above stated unless greater value is declared at time of shipment," and this is relied upon by appellant as fixing the extent of its liability in the absence of a declaration of value by the shipper. The complete answer to its position is found in paragraph (d) wherein it is provided that: "these charges (referring to paragraphs a, b, c,) must not be applied to Live Animals, Live Birds or Live Stock (see paragraph g)." The only reasonable interpretation of this language is that paragraphs a, b, and c have no reference to live animals which come under paragraph (g). But paragraph (g) contains no such provision, as does paragraph (a), limiting the liability of

the express company to the minimum valuation stated in the schedule of rates. We are not at liberty to read into this paragraph what it does not contain. Paragraph (a) evidently relates to charges for the shipment of inanimate objects, and the limitation written into this paragraph, must be regarded as referring to the subject to which it relates. The limitation was not written into paragraph (g) which relates to live animals, and it would be forcing the answer to say that a shipper of such animals had thus been given notice of a limited liability which the schedule applicable to such shipments did not contain.

We find nothing in the bill of lading, which is in the form of a contract between the parties, to defeat a recovery upon the basis of actual value under the facts of the present case. Clause one contains a direction to the shipper to value his stock, which valuation is to be inserted in the contract, presumably by the carrier; but neither the shipper nor the carrier complied with the direction and hence this provision cannot be relied on as a basis for fixing the rate of carriage or as a measure of liability when damages are sustained. Clause two states that the shipper demanded to be advised as to the rates to be charged and was offered alternative rates upon the basis of value declared; but no value was declared and none inserted in the paragraph relating to alternative rates. How then can it be said the shipper was charged with notice that the rate of carriage was fixed upon the basis of value declared, when no value was declared, and that the liability of the carrier was limited in the same manner? But we cannot give any more time to the discussion of the contract, and must be content to suggest that as we view it nothing therein contained in the light of what

195 occurred between the parties is sufficient to preclude a recovery upon the basis of actual value. We concede that appellant could have limited its liability to \$50.00, as is contended, but it did not do so in the bill of lading by requiring the shipper to declare a value, nor by inserting in the clause relating to alternative rates any value whatever. In the following material respects the present case differs from those relied on by appellant: (1) The schedule of rates was not posted at Milwaukee; (2) the shipper was not required to declare a value; and (3) no value was inserted in the paragraph relating to alternative rates as applied to the shipment of live animals. Under these circumstances we cannot agree appellee was charged with notice that the rate of carriage was based upon a valuation of \$50.00, and that the shipper contracted to have the liability of the carrier limited to this amount in the event of loss or injury.

At the trial appellant offered to prove that the failure to insert a valuation in clause 5 of the contract opposite the words "number and kind, value each," was an error of its agent at Milwaukee. The offer was refused and this has been assigned for error. It is too late to correct an error of this kind after the shipment had been made, the injury sustained, and the right of action accrued. Such correction would in effect alter the terms of a written contract not upon the ground of a mutual mistake but because an agent is

villing to say that he did not follow the instructions of his principal in preparing it for execution. We know of no case that goes so far and cannot sustain this contention.

Judgment affirmed.

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UNITED STATES HORSE SHOE COMPANY

vs.

AMERICAN EXPRESS COMPANY, Appellant.

STATE OF PENNSYLVANIA,

*Eastern District:*

I, Alfred B. Allen, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the Opinion in the above entitled cause, so full and entire as appears of Record in said Court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 8th day of July, A. D. 1915.

[Seal of the Supreme Court of Pennsylvania. 1776.]

ALFRED B. ALLEN,  
*Prothonotary.*

97 Supreme Court of Pennsylvania, Eastern District, January Term 1915.

No. 94.

UNITED STATES HORSE SHOE CO.

vs.

AMERICAN EXPRESS COMPANY, Appellant.

*Order to Retain Record.*

And now, to-wit: July 8, 1915, the Prothonotary of this Court is directed to hold the record in this case for sixty days, in order to enable the Appellant, the American Express Company, to apply to the Supreme Court of the United States for a Writ of Error.

J. HAY BROWN,  
*Chief Justice.*

Endorsement: No. 94 Jan. Term 1915. Supreme Court of Pennsylvania, Eastern District. United States Horse Shoe Co. vs. American Express Company, Appellant. Order to Retain Record. Filed July 8 1915 in Supreme Court. Charles F. Patterson, 865 Frick Building Annex, Pittsburgh, Pa.



198 In the Supreme Court of the United States.

AMERICAN EXPRESS COMPANY, Plaintiff in Error,

VS.

UNITED STATES HORSE SHOE COMPANY, Defendant in Error.

*Petition for Writ of Error.*

To the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States:

The petition of American Express Company Respectfully Represents:

That on February 11, 1914 the United States Horse Shoe Company, a corporation, commenced suit against your petitioner in the Court of Common Pleas of Erie County, Pa. as of No. 29 May Term 1914, to recover damages for injuries to a certain colt shipped on August 23, 1913 from the City of Milwaukee, Wisconsin to Erie, Pennsylvania under a live stock contract or Bill of Lading, which contained a clause stating that the rates of transportation were regulated by the value placed upon the animal shipped and when no valuation was declared was based upon a valuation not exceeding the sum of \$5.00 for each colt and providing inter alia that the charge for carriage and the liability for damage was based upon such valuation.

At the trial of the cause it appeared that in making the shipment the plaintiff through its agents had failed to declare the true value of the colt, which was clearly in excess of \$50.00 and thus had violated the provisions of the Act of Congress, approved February 4, 1887 entitled, "An Act to Regulate Commerce," its amendments and supplements and had violated the Act of Congress approved February 19, 1903 entitled, "An Act to further regulate Commerce with foreign nations and among the States", its amendments and supplements, by obtaining transportation for the said property at less than the regular rates and by accepting a concession whereby the property was transported at a less rate than should have been charged for it had the true value of it been declared, by reason of which your petitioner claimed a right under the said statutes to have the contract of transportation held to be unlawful and to have judgment entered for the defendant.

At the trial your petitioner also claimed a right under Article 1, Section 8 of the Constitution of the United States and under the provisions of the Act of Congress approved February 4, 1887 entitled, "An Act to regulate Commerce" and its amendments and supplements and in particular Section 20 thereof, to have the validity of the said clause of the live stock contract or Bill of Lading determined by the decisions of the Supreme Court of the United States, which decisions sustained the validity of the said clause.

Your petitioner also claimed at the trial that as it appeared that the rate of expressage charged and paid for the transportation of the colt was based upon the valuation of \$50.00, that that sum was the

most that the plaintiff could recover in any event, because the rates and tariffs filed by your petitioner with the Interstate Commerce Commission in accordance with law were based upon the minimum valuation of \$50.00 and that such tariffs limited the liability of your petitioner in any event to that sum in case of loss or damage to the animal. The Trial Judge however refused to sustain the position of your petitioner in this regard and refused points presented to him on behalf of your petitioner to the same effect. Thereupon the jury found a verdict for the plaintiff in the said cause in the sum of \$1,960.70, upon which judgment was entered.

Thereafter upon the 26th day of February 1915 the defendant appealed to the Supreme Court of Pennsylvania from said judgment as of No. 94 of January Term 1915 and on July 3, 1915 the Supreme Court of Pennsylvania affirmed the judgment. Your petitioner represents that said judgment of the Supreme Court of Pennsylvania entered on July 3, 1915 is a final judgment in the highest Court of the State of Pennsylvania in which a decision in the said suit could be had.

200 In the said action rights, privileges and immunities were claimed by your petitioner under the Constitution and Statutes of the United States and under authority exercised under the United States and the decision of the said Supreme Court of Pennsylvania was against the rights, privileges and immunities specially set up and claimed under said Constitution, Statutes and authority.

Wherefore your petitioner prays for the allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of Pennsylvania in order that the said judgment may be re-examined and reversed in the Supreme Court of the United States and that the said Writ of Error may be a supersedeas.

And it will ever pray, etc.

AMERICAN EXPRESS COMPANY,  
By WM. G. SMITH, *Manager*.

William G. Smith, being duly sworn according to law, deposes and says that he is Manager of the American Express Company, the above petitioner, and on its behalf says that the facts set forth in the above petition are true to the best of his knowledge and belief.

WM. G. SMITH.

Subscribed and sworn to before me this thirtieth day of July, 1915.

GEO. P. SCHULZE,  
*Notary Public, Cuyahoga County, Ohio.*

My commission expires Mar. 16, 1918.

[Notarial Seal, Cuyahoga County, Ohio.]

And now, to-wit: September 7th, 1915, Writ of Error as prayed for allowed, the same to be a supersedeas; and citation awarded.

MAHLON PITNEY,  
*Associate Justice of the Supreme Court  
of the United States.*



200½ [Endorsed:] In the Supreme Court of the United States.  
 American Express Company, Plaintiff in Error, vs. United  
 States Horse Shoe Company, Defendant in Error. Petition for Writ  
 of Error. Law Office of Charles F. Patterson, Pittsburg, Penna.  
 Frick Building.

201 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the  
 Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of  
 the judgment of a plea which is in the said Supreme Court of Penn-  
 sylvania before you, or some of you, being the highest court of law  
 or equity of the said State in which a decision could be had in the  
 said suit between American Express Company, Plaintiff in Error and  
 United States Horse Shoe Company, Defendant in Error wherein  
 was drawn in question the validity of a treaty or statute of, or an  
 authority exercised under, the United States, and the decision was  
 against their validity; or wherein was drawn in question the validity  
 of a statute of, or an authority exercised under, said State, on the  
 ground of their being repugnant to the Constitution, treaties, or laws  
 of the United States, and the decision was in favor of such their  
 validity; or wherein any title, right, privilege, or immunity

202 was claimed under the Constitution, or any treaty or statute  
 of, or commission held or authority exercised under, the  
 United States, and the decision was against the title, right, privilege  
 or immunity especially set up or claimed under such Constitution  
 treaty, statute, commission, or authority; a manifest error hath hap-  
 pened to the great damage of the said American Express Company  
 as by its complaint appears. We being willing that error, if any  
 hath been, should be duly corrected, and full and speedy justice done  
 to the parties aforesaid in this behalf, do command you, if judgment  
 be therein given, that then under your seal, distinctly and openly  
 you send the record and proceedings aforesaid, with all things con-  
 cerning the same, to the Supreme Court of the United States, together  
 with this writ, so that you have the same in the said Supreme Court  
 at Washington, within thirty days from the date hereof, that the  
 record and proceedings aforesaid being inspected, the said Supreme  
 Court may cause further to be done therein to correct that error  
 what of right, and according to the laws and customs of the United  
 States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the  
 United States, the 7th day of September, in the year of our Lord one  
 thousand nine hundred and fifteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

Allowed by

MAHLON PITNEY,

*Associate Justice of the Supreme Court  
 of the United States.*

202½ Sept. 13/15. I hereby accept service of the within Writ of Error.

JOHN S. REELING,  
*Att'y for U. S. Horse Shoe Co.,*  
*Def't in Error.*

[Endorsed:] Supreme Court of the United States. October Term, 1915. American Express Company, Plaintiff in Error, vs. United States Horse Shoe Company, Defendant in Error. Writ of Error.

203 UNITED STATES OF AMERICA, ss:

To United States Horse Shoe Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania wherein American Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this 7th day of September, in the year of our Lord one thousand nine hundred and fifteen.

MAHLON PITNEY,  
*Associate Justice of the Supreme Court*  
*of the United States.*

203½ Sept. 13/15. I hereby accept service of the within citation.

JOHN S. REELING,  
*Att'y for U. S. Horse Shoe Co.,*  
*Def't in Error.*

204 Know all Men by these Presents, That we, American Express Company, a joint stock association, as principal, and Fidelity & Deposit Company of Maryland, as sureties, are held and firmly bound unto United States Horse Shoe Company in the full and just sum of Five Thousand (\$5,000.00) dollars, to be paid to the said United States Horse Shoe Company, its certain attorney, successors, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this thirtieth day of July, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a Session of the Supreme Court of Pennsylvania in a suit depending in said Court, between United States Horse Shoe Company, plaintiff and appellee and American Express Co., defendant and appellant a judgment for \$1,916.70, interest and costs was rendered against the said American Express Company and the said

American Express Company having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States Horse Shoe Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said American Express Company shall prosecute said Writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN EXPRESS COMPANY,  
By WM. G. SMITH, *Manager*. [SEAL.]  
FIDELITY AND DEPOSIT COM-  
PANY OF MARYLAND,  
By L. P. SHRIVER, [SEAL.]  
*Res. Vice President.*

[Seal Fidelity and Deposit Company of Maryland. Incorporated 1890.]

Scaled and delivered in presence of—

GEO. P. SCHULZE.  
H. H. INKERY.

Approved by—

MAHLON PITNEY,

*Associate Justice of the Supreme Court  
of the United States.*

[Endorsed:] In the Supreme Court of the United States. American Express Company, Plaintiff in Error, vs. United States Horse Shoe Company, Defendant in Error. Bond.

205 I, J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Alfred B. Allen, was at the time of signing the annexed attestation, and now is, Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 16th day of September one thousand nine hundred and fifteen.

[Seal of the Supreme Court of Pennsylvania. 1776.]

J. HAY BROWN.

I, Alfred B. Allen, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable J. Hay Brown by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now Chief Justice of the Supreme Court of Pennsylvania; to whose acts as such, full faith and credit are and ought to be given, as well as

Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 16th day of September, one thousand nine hundred and fifteen.

[Seal of the Supreme Court of Pennsylvania. 1776.]

ALFRED B. ALLEN.

206 STATE OF PENNSYLVANIA,  
*Eastern District:*

I, Alfred B. Allen, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the Record in the above entitled cause, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 16th day of September, A. D. 1915.

[Seal of the Supreme Court of Pennsylvania. 1776.]

ALFRED B. ALLEN, *Prothonotary.*

Endorsed on cover: File No. 24,922. Pennsylvania Supreme Court. Term No. 248. American Express Company, plaintiff in error, vs. United States Horse Shoe Company. Filed September 24, 1915. File No. 24,922.



FILED

JAN 31 1917

JAMES D. MAHER

CLERK

IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1916.**

**No. 248.**

**AMERICAN EXPRESS COMPANY, Plaintiff in Error,**

**vs.**

**UNITED STATES HORSE SHOE COMPANY.**

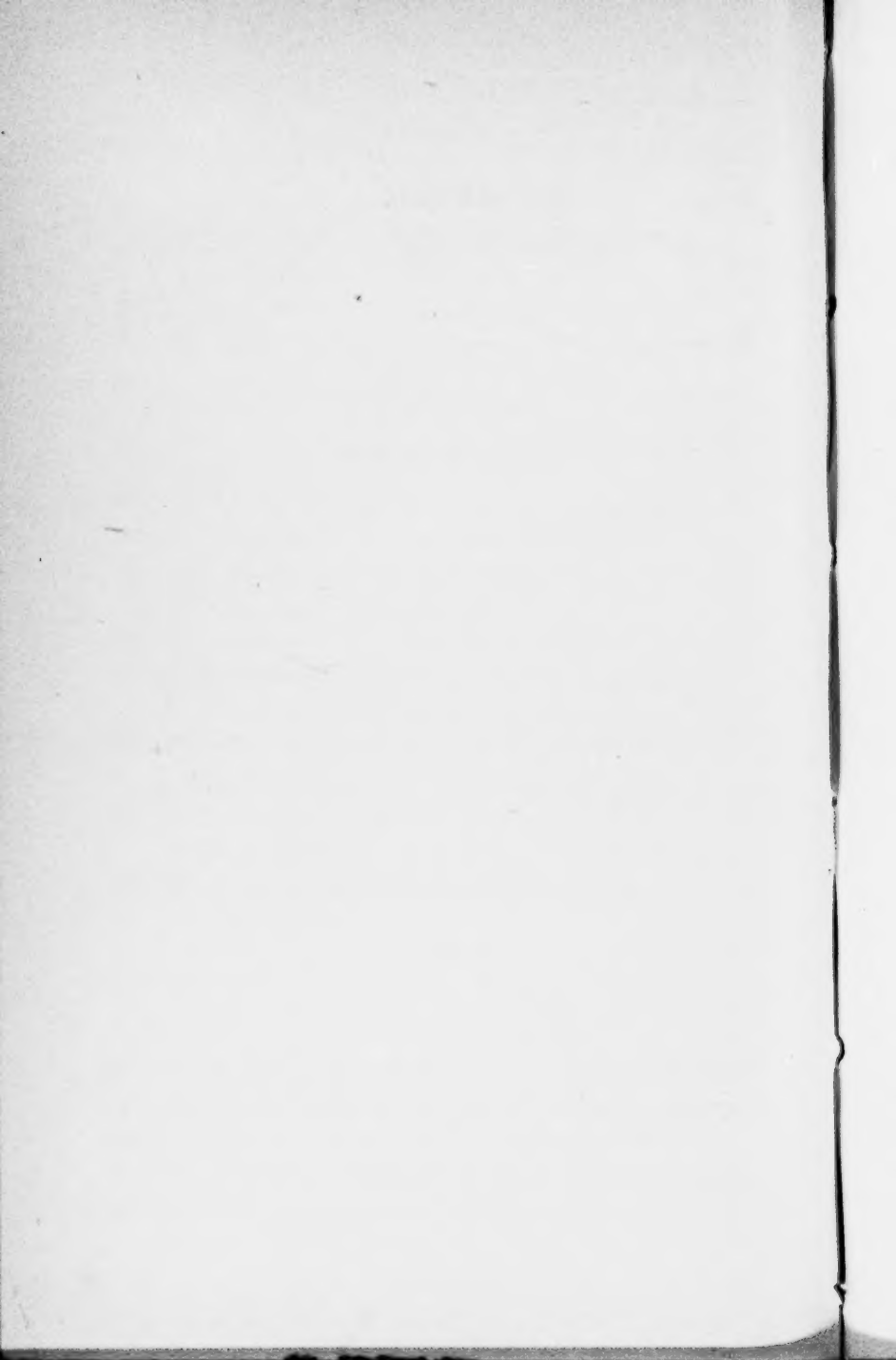
**In Error to the Supreme Court of the State of Pennsylvania.**

**BRIEF FOR PLAINTIFF IN ERROR.**

**CHARLES F. PATTERSON,**

**FRANCIS R. HARBISON,**

**Counsel for American Express Company,  
Plaintiff in Error.**



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IN THE

# Supreme Court of the United States

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OCTOBER TERM, 1916.

No. 248.

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AMERICAN EXPRESS COMPANY, Plaintiff in Error,

vs.

UNITED STATES HORSE SHOE COMPANY.

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In Error to the Supreme Court of the State of Pennsylvania.

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## BRIEF FOR PLAINTIFF IN ERROR.

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### Question Involved.

The sole question in this case is whether under the ordinary form of limited liability live stock contract, the defendant in error, plaintiff below, can recover more than the maximum valuation charge upon which the rate of carriage was based in an interstate shipment of a colt injured during transportation. The Supreme Court of Pennsylvania having answered this question in the affirmative, the case is brought here on writ of error.

**Statement of the Case.**

On August 23, 1913, the defendant in error, through one Mitchell, its agent, shipped from Milwaukee, Wisconsin, to Erie, Pennsylvania, by the American Express Company, plaintiff in error, a mare and a colt under the usual form of limited liability live stock bill of lading. The live stock contract (Record, page 5 et seq.) was signed by the shipper and the Express Company's agent (Record, pages 61 and 63), the amount of expressage estimated at \$75.00 upon the basis of a weight of one thousand pounds for the mare and five hundred pounds for the colt (Record, pages 60 and 61), and upon delivery at the point of destination, the colt only weighing three hundred pounds the expressage charge was corrected and \$69.00 was charged and paid as transportation charges (Record, page 56). The colt was injured at Erie, Pa., while in a stable at that point before delivery to the consignee and suit was brought in the Common Pleas of Erie County, Pennsylvania, to recover its actual value. The defendant in error declared upon the bill of lading the pertinent provisions of which are as follows (Record, page 5):

“NOTICE TO SHIPPERS—The Shipper will value his stock, which valuation will be inserted in the contract, and the charge for carriage and any liability for damage will be based on such valuation.”

"American Express Company—Limited Liability Live Stock Contract. (6069) July, 1910.

\* \* \* \* \*

"1. That the Express Company undertakes to forward \* \* \* the animals hereinafter mentioned \* \* \*.

1 mare, 1 colt (300 lbs.), two; consigned to W. B. Mitchell at Erie, Pa., Erie, Pa., for the sum of seventy-five dollars and no cents, which charge is fixed by and based upon the value of said animals as declared by the shipper, as hereinafter mentioned.

"2. And in consideration of the premises, said parties agree: That the shipper, before delivering the said animals to said Express Company, demanded to be advised of the rates to be charged for the carriage of said animals as aforesaid, and thereupon was offered by said Express Company alternative rates proportioned to the value of said animals, such value to be fixed and declared by the shipper, and according to following tariff of charges, viz:

"3. For horses \* \* \* of a value not exceeding \$100.00 each, \$100.

"For \* \* \* colts \* \* \* of a value not exceeding \$50.00 each, \$50.

\* \* \* \* \*

"4. And said parties further agree that any excess value declared by the shipper, over and above the limit of value fixed by the company's rate is

to be charged for, in addition to the above-mentioned charge, according to the following schedule, to wit:

When the merchandise rate of the company between the points shipment of animals is made is	The additional charge for excess value will be
Not over \$2 per 100 lbs.....	1% on excess valuation
Over \$2 per 100 lbs. and not over \$3 per 100 lbs.....	1½% on excess valuation
Over \$3 per 100 lbs. and not over \$5 per 100 lbs.....	2% on excess valuation
Over \$5 per 100 lbs.....	2½% on excess valuation

"5. The shipper, in order to avail himself of said alternative rates, and in consideration thereof, being asked by the Express Company to value said property, now declares the values hereinafter mentioned to be the true values of said animals so to be shipped as follows, to wit:

(Number and kind)..... Value each, \$.....  
 (Number and kind)..... Value each, \$.....  
 (Number and kind)..... Value each, \$.....

(Shipper must in all cases be required to declare value).

"6. \* \* \* The shipper hereby releases and discharges the Express Company from all liability for delay, injuries to or loss of said animals from any cause whatever, unless such delay, injury or loss shall be caused by the negligence of the agents or employes of the Express Company, and in such event the Express Company shall be liable only to the extent of actual damage to the animal or animals injured, which shall in no event exceed the

sum herein declared by the shipper to be the value thereof; and for the purpose of ascertaining or assessing such damage, whether the same be a total or a partial loss, the value of said animals as herein declared by the shipper shall be conclusively deemed to be the true value thereof."

The agent of defendant in error who made the shipment was experienced in the shipping of live stock. (Record, page 34.)

The plaintiff in error offered in evidence the official express classification No. 21 Supplement 11, and the lawful and joint tariff No. 1-C and Supp. No. 5-3 in force on the lines of its company on August 23, 1913, properly certified by the secretary of the Interstate Commerce Commission. (Record, pages 66 to 69).

The plaintiff in error further proved by George T. Carlin, its superintendent at Cleveland, Ohio, the method of determining from this express classification schedule the charges on the live stock shipped by the defendant in error, to wit: that colts weighing not over 500 pounds each, not crated, are shipped at 1½ merchandise rates and that the rate on a colt weighing 300 pounds, as stipulated in the bill of lading, would be \$9.

The pertinent provisions of the official express rates filed, paragraph 21, are (Record, page 80) :

"(a) The rates governed by this classification are based upon a value of not exceeding \$50 on each

shipment of 100 pounds or less, and not exceeding 50 cents per pound, actual weight, on each shipment weighing more than 100 lbs., and the liability of the express company is limited to the value above stated unless a greater value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under the schedule of charges for excess value in paragraph (c) of this rule.

(d) These charges must not be applied to live animals, live birds or live stock \* \* \* (see paragraph g) \* \* \*.

(g) Valuation charges on live animals, live birds, or live stock :

The classification rates on live animals, live birds, or live stock apply only when the declared value does not exceed the following :

Horses, jacks or mules, \$100 each.

Bulls, burros, calves, colts, cows, deer, dogs, elks, goats, hogs, ponies, sheep, steers, or animals not otherwise specified \$50 each.

\* \* \* \* \*

When the merchandise rate is over \$3.00 and not over \$5.00 per an additional charge must be made on the excess value according to the following :

When the merchandise rate is not over \$2.00 per 100 lbs. the additional charge will be 1% of the excess valuation.

When the merchandise rate is over \$2.00 and not over \$3.00 per 100 lbs. the additional charge will be 1½% of the excess valuation.

When the merchandise rate is over \$3.00 and

not over \$5.00 per 100 lbs., the additional charge will be 2% of the excess valuation.

When the merchandise rate is over \$5.00 per 100 lbs., the additional charge will be 2½% of the excess valuation."

The Supreme Court of Pennsylvania construed the law as laid down in the cases of *Boston & Maine R. R. Co. v. Hooker*, 233 U. S., 97; *Santa Fe Railway Co. v. Robinson*, 233 U. S., 173; *Pierce v. Wells Fargo & Co.*, 236 U. S., 278, that the appellant could have limited its liability to \$50, but concluded that it did not do so because:

FIRST. The schedule of rates was not proven to have been posted in Milwaukee, holding that the burden was on the plaintiff in error to show compliance with the act before it could charge the defendant in error with notice of its rates and limitation of liability therein filed with the commission;

SECOND. The shipper was not required to declare a value; and

THIRD. No value was inserted in the paragraph of the bill of lading provided therefor. (Record, page 94.)

This decision is reported in 250 Pa. State Reports, 547.

A writ of error was granted The American Express Company from this ruling by Mr. Justice Pitney.

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### **Assignments of Error.**

On this 29th day of July, 1915, comes the American Express Company, appellant in the Supreme Court of Pennsylvania and plaintiff in error in the Supreme Court of the United States, by Charles F. Patterson, its attorney, and says that in the record and proceedings, decision and final judgment of the Supreme Court of Pennsylvania in the above entitled matter there is manifest error in this, to wit:

First. The Supreme Court erred in affirming the judgment and overruling appellant's Second Specification of Error, which was as follows:

"2nd. The Court erred in refusing to charge the jury as requested by the defendant in its second point, which point and answer thereto are as follows:

'2. The shipment of the mare and colt having been made under a written contract, required by the laws of the United States, and being interstate in character, the plaintiff in no event can recover more than the sum of \$50.00, with lawful interest thereon from the date of injury, and it is immaterial whether or not the figures of \$50.00 were written in their proper place in the live stock contract, it appearing that the expressage charged and paid was based upon a valuation of \$50.00 for the animal carried in accordance with the rates and schedules filed by the defendant company with the Inter-

state Commerce Commission, and in force and effect at the time the shipment was made. Refused.'

'Before verdict and before the jury retire to consider upon their verdict, counsel for the defendant excepts to the charge, generally, and also to the answers to defendant's points, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.

PAUL A. BENSON,  
J.'"

And the said American Express Company in support of said assignment of error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the constitution and statutes of and authority exercised under the United States, specially set up and claimed by the said American Express Company.

Second. The Supreme Court erred in affirming the judgment and overruling appellant's Third Specification of Error, which was as follows:

"3rd. The Court erred in refusing to charge the jury as requested by the defendant in its third

point, which point and the answer thereto are as follows:

'3. The shipper who was the agent of the plaintiff and whose contract the plaintiff has adopted not having at the time of the execution of the live stock contract declared any value upon the colt in excess of \$50.00, and expressage having been charged and paid for the carriage of the colt, based upon a valuation on it of that sum, the plaintiff in no event can recover more than \$50.00, with interest thereon. Such sum of \$50.00 being the basis of calculating the charge for the carriage of the colt from Milwaukee, Wis., to Erie, Pa., in accordance with the rates and schedules filed by the defendant company with the Interstate Commerce Commission in accordance with law, and in force and effect at the time the shipment was made. Refused.'

'Before verdict and before the jury retire to consider upon their verdict counsel for defendant excepts to the charge, generally, and also to the answers to defendant's points, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.

PAUL A. BENSON,  
J.'"

And the said American Express Company in support of said assignment of error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provi-

sions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the constitution and statutes of and authority exercised under the United States specially set up and claimed by the said American Express Company.

Third. The Supreme Court erred in affirming the judgment and overruling appellant's Fourth Specification of Error, which was as follows:

"4th. The Court erred in refusing to charge the jury as requested by the defendant in its fourth point, which point and the answer thereto, are as follows:

'4. It was the duty of the plaintiff through its agent Mitchell to declare the value of the colt at the time it was offered for shipment, and he not having declared any value in excess of \$50.00, it is immaterial that the blank spaces provided in the live stock contract for the declaration of value are unfilled and the express charges for the transportation of the colt from Milwaukee, Wis., to Erie, Pa., having been charged and paid upon the basis of \$50.00 as a valuation in accordance with the rates and schedules filed by the defendant company in accordance with law and in force and effect at the time the shipment was made the plaintiff's recovery in any event is limited to the sum of

\$50.00 with interest thereon from the date of the accident. Refused.'

'Before verdict and before the jury retire to consider upon their verdict counsel for defendant excepts to the charge, generally, and also to the answers to defendant's point, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.

PAUL A. BENSON,  
J.'"

And the said American Express Company in support of said assignment of error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the constitution and statutes of and authority exercised under the United States specially set up and claimed by the said American Express Company.

Fourth. The Supreme Court erred in affirming the judgment and overruling appellant's Fifth Specification of Error, which was as follows:

"5th. The Court erred in refusing to charge the jury as requested by the defendant in its fifth

point, which point and the answer thereto are as follows:

‘5. The plaintiff is charged by law with a knowledge of the rates and schedules of the defendant properly filed with the Interstate Commerce Commission which were in force and effect at the time the transaction took place, so far as they effect the carriage of the animals. The failure of the plaintiff’s agent to declare any valuation upon the colt in excess of \$50.00 limits the recovery of the plaintiff in any event to the sum of \$50.00 with interest thereon under the pleadings and all the evidence. Refused.

‘Before verdict and before the jury retire to consider upon their verdict counsel for defendant excepts to the charge, generally, and also to the answers to defendant’s points, and exceptions are accordingly sealed for the defendant, before verdict and before the jury retire to consider upon their verdict.

PAUL A. BENSON,  
J.’”

And the said American Express Company in support of said assignment of error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, “An Act to Regulate Commerce,” and its amendments and supplements, and in particular of section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity

under the constitution and statutes of and authority exercised under the United States specially set up and claimed by said American Express Company.

FIFTH. The Supreme Court erred in affirming the judgment and overruling Appellant's Sixth Specification of Error, which was as follows:

"6th. The Court erred in sustaining the objection of the plaintiff to the offer of the defendant to prove that the figures '\$50' and '\$100' were inserted in the wrong place in the live stock contract in the haste of the moment at the time the contract was signed, such offer and the ruling of the court thereon being as follows: W. M. Gillin, a witness *ex parte defendant*, being on the stand, was asked the following question:

'Q. In this contract, opposite the words, "For Horses, Jacks or Mules," in Section 3, is written \$100. State how and under what circumstances you happened to write those particular figures in that particular contract?'

Objected to as incompetent, irrelevant and immaterial; it seeks to change the written contract.

*By Mr. Patterson:*

The purpose is to show that these words were written in error in the wrong place in the contract, to be followed by

evidence showing what the rates were filed with the Commission for those values.

*By the Court:*

I don't think it is proper unless they show that they advised Mr. Mitchell of that mistake at the time. If that knowledge was brought to Mr. Mitchell before the articles were shipped it might be competent.

*By Mr. Patterson:*

We propose to prove by the witness on the stand that at the time the live stock contract was signed by Mr. Mitchell and by himself as agent for the express company that a conversation took place the substance of which was that the rate of expressage charges varied with the values fixed upon the animals; that the minimum valuation upon which the rates were based was \$100.00 for a horse and \$50.00 for a colt, and that the witness now upon the stand, in the haste of the moment, inserted the words \$100.00 opposite the words "For Horses, Jacks, etc.," and the words \$50.00 opposite the words "Bulls, Colts, etc.," instead of inserting such values in Section 5 of said contract opposite the words "Number and Kind, Value Each," so many dollars. This for the purpose of proving that the figures were inserted in the wrong place in the contract in error by the mistake of the witness; to be followed by



proof that the rates charged the shipper and consignee were based upon those valuations in accordance with the rates and schedules filed with the Interstate Commerce Commission by the Company.

The offer is objected to as incompetent, irrelevant and immaterial. It seeks to vary or alter the terms of a written instrument, the bill of lading, upon which the defendant company accepted these horses for shipment and forwarded them.

*By the Court:*

As the proposition stands the objection is sustained and exception sealed for the defendant. If they can show further that the mistake was understood, that the real facts were understood by both the shipper and the defendant, it might be a different proposition."

And the said American Express Company in support of said Assignment of Error claim that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and its amendments and supplements, and in particular of section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of and

authority exercised under the United States specially set up and claimed by the said American Express Company.

SIXTH. The Supreme Court erred in affirming the judgment and overruling Appellant's Seventh Specification of Error, which was as follows:

"7th. The Court erred in sustaining the objection of the plaintiff to a question asked W. M. Giffin, a witness for the defendant, to the effect that the figures '\$50.00' and '\$100.00' had been inserted in mistake in the contract and why they had been inserted, such question and the ruling of the Court thereon being as follows: W. M. Giffin, a witness *ex parte* defendant being on the stand and being engaged in explaining the circumstances under which the live stock contract had been executed was asked the following question, which was objected to and the objection sustained:

'Q. Will you state why these figures were inserted in the places in which they now are in the contract instead of being inserted in their proper place in Schedule 5?'

Objected to as incompetent, irrelevant and immaterial, and seeks to vary or alter the terms of the written instrument on which this defendant company accepted the horses for shipment.

Objection sustained and exception sealed for the defendant."

And the said American Express Company in support of said Assignment of Error claims that the limitation of liability in the contract sued upon and in the rates, tariffs and regulations filed by it with the Interstate Commerce Commission was valid under the provisions of the Act of Congress approved February 4, 1887, entitled. "An Act to Regulate Commerce," and its amendments and supplements and in particular of Section 20 thereof.

Which decision of the Supreme Court of Pennsylvania was against a title, right, privilege and immunity under the Constitution and Statutes of and authority exercised under the United States especially set up and claimed by the said American Express Company.

Wherefore, for these manifest errors appearing in the record, the said American Express Company, Appellant in the Supreme Court of Pennsylvania and Plaintiff in Error in the Supreme Court of the United States, prays that the judgment of the said Supreme Court of Pennsylvania be reversed and set aside and that judgment be rendered granting it its rights under the Constitution, Statutes and laws of the United States.

CHARLES F. PATTERSON,  
*Of Counsel for American Express Company.*

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**Argument.**

The purpose of this brief is to show :

FIRST. That the presumption in this case was that the plaintiff in error published its tariffs at Milwaukee, Wis., as required by law.

SECOND. That the defendant in error is conclusively presumed to have had knowledge of the lawful rate on the colt from Milwaukee, Wis., to Erie, Pa., which rate was based upon a legal limitation of liability.

THIRD. That there was no duty on the plaintiff in error to require the shipper to declare a valuation, and no valuation being declared by the shipper, it impliedly assented to the maximum liability of \$50.00 stated in the bill of lading and the tariff filed with the Interstate Commerce Commission, thus making that amount the "agreed valuation."

FOURTH. That the contract of shipment as evidenced by the bill of lading and the tariff filed with the Commission fixing the rate charged for the shipment and limiting the liability thereon, is conclusive in this action against a recovery in a sum greater than \$50.00 and legal interest.

FIFTH. That the tariff filed with the Commission and the bill of lading signed by the defendant in error fixed the charge upon a rate based on a limitation of liability for damages to a sum not over \$50.00.

## I.

THE CARRIER IS ENTITLED TO THE PRESUMPTION THAT ITS BUSINESS IS BEING CONDUCTED LAWFULLY.

This presumption was denied the plaintiff in error.

The Supreme Court of Pennsylvania, in its opinion by Justice Elkin, said (Record, page 92):

“\* \* \* the burden was on the defendant express company to prove that the required publication was made, if its purpose was to charge plaintiff with notice of the published rates and conditions upon which the colt was received for shipment.”

This Court has decided that there is a presumption that the carrier has complied with the law and published its rates in conformity with the provisions of the Interstate Commerce Act.

The question at bar was before this Court in *Cincinnati & Tex. Pac. Ry. vs. Rankin*, 241 U. S., 319.

Mr. Justice McReynolds, in the opinion of the Court, said (327):

“We cannot assent to the theory apparently adopted below that the interpretation and effect of

a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the Interstate Commerce Act. It cannot be assumed, merely because the contrary has not been established by proof that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.*' "

In *New York Central, etc., R. R. vs. Beaham*, 242 U. S., 148, Mr. Justice McReynolds again said (151):

"The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and common law principles accepted and enforced in federal courts. And the carrier is entitled to the presumption that its business is being conducted lawfully. *Southern Express Company vs. Byers*, 240 U. S., 612, 614; *Cincinnati, New Orleans & Texas Pacific Railway Co. vs. Rankin*, 241 U. S., 319, 326."

*The rate when made out and filed with the Commission is notice, and the effect is not lost although it is not actually posted in the station.*

*Kansas City Southern Ry. vs. Carl*, 227 U. S.,  
639, 652;  
*Boston & Maine R. R. Co. vs. Hooker*, 233 U.  
S., 97, 111.

There is no dispute that the filed rates were actually placed before the agent of the defendant in error.

The bill of lading upon which it declares in this suit attached to its declaration recites the

“tariff of charges” (Record, page 6)

in the second and third paragraphs exactly as given in paragraph (g) in the schedule filed with the Interstate Commerce Commission. (Record, page 81).

The bill of lading likewise gave ample notice of the limitation of liability. (Record, page 5).

It said:

“\* \* \* any liability for damages will be based on such valuation.”

as the shipper might make or the charge for carriage be made upon.

It is entitled:

“Limited Liability Live Stock Contract.”

It recites that the shipper was offered alternative rates on value according to a tariff of charges based on

1. A value of not over \$50 for the colt; and
2. Any excess value  
"over and above the limit of value fixed by the Company's rate."

And paragraph six provides the usual carrier limitation of liability to the agreed valuation.

## II.

THE SHIPPER'S KNOWLEDGE OF THE LEGAL RATE IS CONCLUSIVELY PRESUMED, THE LIMITATION OF LIABILITY IS PART OF THE RATE, AND THE DEFENDANT IN ERROR IS THEREFORE CONCLUSIVELY PRESUMED TO HAVE HAD NOTICE OF THE LIMITATION OF LIABILITY IN THE RATE CHARGED AND PAID BY IT.

(a) The shipper's knowledge of the lawful rate is conclusively presumed.

In *Louisville & Nashville R. R. vs. Maxwell*, 237 U. S., 94, Mr. Justice Hughes said (98):

"The shipper's knowledge of the lawful rate is conclusively presumed \* \* \*."



In *Adams Express Co. vs. Croninger*, 226 U. S., 491, Mr. Justice Lurton said (508) :

“The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission.”

*Kansas City So. Ry. vs. Carl*, 227 U. S., 639, 652.

(b) To the extent that limitations of liability are not forbidden by law, they become, when filed, a part of the rate.

The limitations of liability in the bill of lading and in the tariffs filed with the Interstate Commerce Commission are similar to ones which have been before this Court repeatedly and held legal, following

*Adams Express Co. vs. Croninger*, 226 U. S., 491.

This limitation is therefore a part of the rate.

In *Chicago, R. I. & Pacific Ry. Co. vs. Cramer*, 232 U. S., 490, suit was brought to recover the real value of a carload of hogs shipped from Galt, Iowa, to Chicago, Ill., and killed in transportation. Alternative rates existed in this case.

Mr. Justice Lamar said (493) :

“But on June 29, 1906, Congress passed the Hepburn Act, c. 3591, 34 Stat, 584, which estab-

lished in interstate commerce a uniform rule of liability. That rule of liability is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property."

In *Missouri, etc., R. R. vs. Harriman*, 227 U. S. 665, this Court said (669) :

"When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903."

In *Pierce Co. vs. Wells Fargo & Co.*, 236 U. S., 278, Mr. Justice Day said (285) :

"\* \* \* so long as the tariff rate remains operative, the alternative rates based on value are deemed to be in force and controlling of the rights of the parties."

(c) Since the limitation of liability is required to be filed in the carrier's tariffs, the shipper was bound by such limitation.

In *Boston & Maine R. R. vs. Hooker*, 233 U. S., 97, Mr. Justice Day said (113):

"It follows, therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at \$100 and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached."

*Atchison, Topeka, etc. Ry. Co. vs. Robinson*, 233 U. S., 173:

This was an action brought to recover damages to a race horse shipped in interstate commerce.

It appeared from the testimony that the arrange-

ment was made for the shipment over the telephone, but that after the car had started from the place of loading, an agent of the company presented to the plaintiff a printed contract made in conformity with the schedules filed with the Interstate Commerce Commission but without calling his attention to its provisions, without informing him of its contents, and without procuring his assent to the terms therein stated, although he admitted executing the contract. The schedules filed fixed the rates, which were based upon a declared value not exceeding a certain amount.

The court, after reciting the *Carl*, *Harriman*, *Cramer* and *O'Connor* cases, said (180) :

"We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing."

## III.

THE MAXIMUM LIABILITY OF \$50.00 FOR A COLT PROVIDED IN THE TARIFF OF THE PLAINTIFF IN ERROR IS THE "AGREED VALUATION."

(a) If no value is declared by the shipper, the tariff rate applicable to such a state of facts applies.

The shipper must be held to have notice of the recital in paragraph 4 of the bill of lading (Record, page 6), that there was a "limit of value fixed by the company's rate" as well as the limit recited in the filed tariff.

As Mr. Justice Day said in *Boston & Maine R. R. vs. Hooker*, 233 U. S., 97, after stating defendant in error's alternative rights,

"\* \* \* or, as she did, she might have made no valuation \* \* \* in which event the rate and the corresponding liability would have automatically attached."

The question involved in the Hooker case was practically the same as is involved here and that decision should rule this case.

The court stated the question in it to be (107):

"The defendant insists that the recovery of the

plaintiff should have been limited to the sum of \$100 in view of certain requirements made by it concerning the transportation of baggage and filed with the Interstate Commerce Commission. From the findings of fact it appears that the baggage was checked upon a first-class ticket purchased for the plaintiff (although not used by her, she traveling upon another similar ticket purchased by herself); that at the time the baggage was checked the plaintiff had no notice of the regulations hereinafter referred to limiting the liability of the defendant (further than such notice is to be presumed from the schedules filed and posted as hereinafter stated); that no inquiry was made by the defendant on receiving the plaintiff's baggage as to its value; that there was no evidence that any more expensive or different mode of transportation was adopted for baggage the value of which was declared to exceed \$100 than for other baggage; that any reasonable person would infer from the outward appearance of the plaintiff's baggage when tendered to the defendant for transportation that the value largely exceeded \$100, and that the loss of plaintiff's baggage was due to the negligence of defendant."

In *Great Northern Ry. Co. vs. O'Connor*, 232 U. S., 508, Mr. Justice Lamar, in the opinion of the court, said (515):

"The tariffs are filed with the Commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary

that there shall be an inquiry as to each article or a distinct agreement as to the value of each shipment. If no value is stated the tariff rate applicable to such a state of facts applies."

(b) If the shipper does not declare a value, he will be held to have impliedly assented to a limitation specified in the bill of lading which he accepted and used and which was also embodied in the tariff schedules filed with the Commission.

The State Supreme Court said (Record, page 93) :

"Did the bill of lading or the contract of shipment between the parties limit the liability of the express company to \$50.00 as the value of the colt? *The rate charged was based upon this valuation*, but the shipper did not declare that or any other value, and had no actual notice of the intention of appellant to limit its liability in this manner. \* \* \* The duty of the shipper to declare a value should be no greater than that of the carrier to ask such valuation to be declared."

This conclusion is contrary to the decisions of this court.

In *Missouri, Kansas & Texas Railway vs. Harri-*  
*man*, 227 U. S., 665, an action under a special livestock

transportation contract for the value of cattle killed, Mr. Justice Lurton said (668-669) :

"That the shipper had the choice of two rates, one twenty per cent. higher than the other, upon this shipment, is shown by the provisions of the shipping contract and the tariff sheets referred to therein.

"In the case at bar it has been said that the shipper was not asked to state the value, but only signed the contract handed to him and made no declaration. But the same point was made in the Hart case, when the court said (page 337) :

"A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.' "



In *Pierce Co. vs. Wells Fargo & Co.*, 236 U. S., 278, Mr. Justice Day said (283) :

"The case as made therefore presents the question whether one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to \$50.00, which is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods, is entitled in case of loss to recover the full value of the property. \* \* \*

(285) "But it is said, and this fact was the basis of the dissenting opinion in the Circuit Court of Appeals, that there was no valuation at all in this case, and that the disproportion between the actual value of the automobiles shipped—about \$15,000—and \$50 demonstrates this fact, and it is insisted that what was done was merely an arbitrary and unreasonable limitation in the guise of valuation. This argument overlooks the fact that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property. None such was attempted in the *Neiman-Marcus* case, the *Croninger* case or the *Hooker* case. But the contract embodied in the receipt was sustained in the *Express Company* cases, because of the acceptance of the same by the parties as the basis of shipment, and

by force of the statute as to the filed tariff and the requirement of the shipper to take notice of its terms and to be bound thereby."

In *Adams Express Co. vs. Croninger*, 226 U. S., 491, Mr. Justice Lurton, in the opinion of the court, said (508) :

"That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein."

(c) The bill of lading accepted showed that the charge made was based upon a valuation of \$50.00 unless a greater value should be stated therein by the shipper, and the knowledge of the shipper that the rate was based upon this valuation is to be presumed from the terms of the bill of lading and the published schedules filed with the Commission.

The shipper must be held to have had actual notice of what was in the contract, which provided (Record, page 5) :

- (1) "the charge for carriage and any liability for damage will be based on \* \* \*"

the same valuation;

- (2) The contract form was named  
"Limited Liability Live Stock Contract;"
- (3) That the  
"charge is fixed by and based upon the  
value of said animals as declared by the  
shipper as hereinafter mentioned;"
- (4) That there were alternate rates, the first based  
upon a value of not over \$50 for the colt and  
the other upon a declared value "over and  
above the limit of value fixed by the company's  
rate;"
- (5) That the tariff rate was based upon a maxi-  
mum liability (Record, page 6)  
"for \* \* \* colts \* \* \* of a  
value not exceeding \$50.00 each"  
and an additional charge was required to be  
paid for excess value declared;
- (6) That liability for damages was limited (para-  
graph 6) to the value upon which the rate was  
charged.

## IV.

THE CONTRACT OF SHIPMENT, AS EVIDENCED BY THE BILL OF LADING AND THE TARIFFS FILED WITH THE COMMISSION FIXING THE RATE CHARGED FOR THE SHIPMENT AND LIMITING THE LIABILITY THEREFOR, IS CONCLUSIVE IN AN ACTION TO RECOVER FOR LOSS OR DAMAGES IN A GREATER SUM.

In *Kansas City Southern Ry. vs. Carl*, 227 U. S., 639, Mr. Justice Lurton said (650) :

"The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. \* \* \*

"To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

In *New York Central, etc. R. R. vs. Beaham*, 242 U. S., 148, Mr. Justice McReynolds said (151) :

"In the circumstances disclosed, acceptance and use of the ticket sufficed to establish an

agreement *prima facie* valid which limited the carrier's liability. Mere failure by the passenger to read matter plainly placed before her could not overcome the presumption of assent. *Railroad Company vs. Fraloff*, 100 U. S., 24, 27; *The Kensington*, 183 U. S., 263; *Phineas Fonseca vs. Cunard Steamship Co.*, 153 Massachusetts, 553.

"In order to determine the liability assumed for baggage it was proper to consider applicable tariff schedules on file with the Interstate Commerce Commission; and the carrier had a federal right not only to a fair opportunity to put these in evidence but also that when before the court they should be given due consideration. *Southern Express Company vs. Byers*, 240 U. S., 614; *Kansas City Southern Railway Co. vs. Jones*, 241 U. S., 181."

In *Cincinnati & Texas Pac. Ry. vs. Rankin*, 241 U. S., 319, defendants in error shipped a car of mules in interstate commerce. They signed and accepted a through bill of lading very similar to the one in this case, the pertinent portions of which follow:

"Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates."

"Limit of value. That this agreement is subject to the following terms and conditions, which the said shipper accepts as just and reasonable, and which he admits having read and having had explained to him by the agent of the said carrier, viz.:

That the published freight rates on livestock

of said carrier are, in all cases, based on the following maximum calculations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

\*       \*       \*       \*       \*       \*

Horses or mules, not exceeding \$75.00 each.

\*       \*       \*       \*       \*       \*

That the tariff regulations of said carrier provide that for every increase of one hundred per cent. or fraction thereof, in the above valuations, there shall be an increase of fifty per cent. in the freight rate; and that the said shipper in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals unless an additional amount is herein stated and paid for."

With reference to the notice of limitation of liability this court said (328) :

"But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient *prima facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions the burden of proof is upon him.

"The bill of lading in question is plainly enti-

tled "Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates' and contains the conspicuous provisions concerning published rates, tariff regulations, choice offered the shipper and limit upon the carrier's liability, etc., above set out. In view of these recitals and admissions, the limitation of liability must be treated as *prima facie* valid."

V.

THERE REMAINS TO BE CONSIDERED THE ARGUMENT OF THE COURT BELOW THAT (A) THE FILED TARIFF DID NOT EXPRESSLY LIMIT THE LIABILITY OF THE CARRIER IN PARAGRAPH (G) TO THE VALUATION CHARGED UPON, SO AS TO GIVE THE SHIPPER NOTICE OF A LIMITED LIABILITY, AND, (B) THE BILL OF LADING DID NOT LIMIT THE CARRIER'S LIABILITY TO THE VALUE ON WHICH THE CHARGE FOR TRANSPORTATION WAS MADE.

(a)—The court below based its conclusion upon the construction of the tariff filed with the Commission (Record, p. 71), that the "valuation charges" therein contained

"several paragraphs relating to rates, and classifications" (Record, p. 93).

The court's conclusion excludes the distinction that is made between rates and charges.

This Exhibit is entitled,

"Section 11, page 8, Supplement No. 11 to Official Express Classification No. 21."

Paragraph (a) "Valuation Charges" provides for

"The rates governed by this classification \* \* \*"

This includes all rates; not those on inanimate objects to the exclusion of other objects named under the heading of Valuation Charges.

The court errs when it says:

"Paragraph (a) evidently relates to charges for shipment of inanimate objects and the limitation written into this paragraph must be regarded as referring to the subject to which it relates," (Record, p. 94)

because

Paragraph (a) does not relate to "charges." It relates to the basic value. It fixes the basic value, the unit, upon which the rates and charges named in the whole sub-division, called "Valuation Charges," are fixed.

The word "charges" does not appear in the paragraph.

It expressly says that:

"The rates governed by this Classification" (not paragraphs b and c alone, but—this classi-



fication, i. e., everything in it) "are based upon a value not exceeding \$50 on each shipment of 100 lbs. or less. \* \* \*", and

in paragraph (i) reiterates this fact by providing,

"The charges for value must in all cases be based on the regular merchandise rates per 100 lbs. \* \* \*"

The reasonable and proper construction of this paragraph read with the whole subdivision does not sustain the court's conclusion that it relates solely to inanimate objects, and therefore, the court's conclusion that the limitation in the paragraph must be confined to inanimate objects falls.

The court lost sight of the distinction between value and charges when it concluded that—

"The only reasonable interpretation of this language,"

from the tariff—

"(d) These charges must not be applied to Live Animals, Live Birds or Live Stock (see paragraph g)"

"is that paragraphs a, b, and c have no reference to live animals which come under paragraph (g)."

Paragraph (d) says

"these charges."

An examination of the classification shows that paragraph (a) does not purport, in any manner, to specify charges. As we have shown, paragraph (a) fixes a basic rate and a basic liability.

Paragraph (b) limits and modifies this basic valuation and liability in cases where an invoice accompanies the shipment, by fixing the invoice valuation as the basic value.

Paragraph (c) is the first of the three relating to charges. It does not fix charges on the basic valuation, nor does it fix charges on merchandise of the basic valuation.

*Its sole purport is to fix charges on general classification—*

“when the value declared by the shipper, or indicated by the invoice”

exceeds the basic valuation. In these cases it fixes charges on the excess value.

This interpretation of paragraphs (a), (b) and (c) is self-evident.

This paragraph (c) fixes a schedule of charges for excess value upon articles covered by it.

This is the General Classification. All articles not excepted specifically come within this classification and it creates a—

“Schedule of charges for excess value”

referred to in paragraph (a), which schedule is used as

a basic schedule for charges on excess value, not only in paragraph (c), but in others, fixing charges on objects excepted from the General Classification.

Paragraph (g) then fixes the valuation charges on Live Animals, etc.

It recognizes first,

“The Classification Rates on Live Animals,”  
(Record, p. 81).

They are found for colts in Art. 7, page 22, of the Official Express Classification (Record, p. 82), and are—

“Colts,” etc.

“Animals weighing not over 500 lbs. each not crated,  $1\frac{1}{2}$  Mdse.”

It then provides that this rate—in this case of  $1\frac{1}{2}$  Mdse. on the colt, 300 lbs. weight—should

“apply only when the declared value does not exceed the following,”

“\* \* \* Colts \* \* \* \$50.00 each,”

and then provides for additional charges on the excess value according to schedule, graduated on a percentage of the excess value.

The maximum value, therefore, upon which the charge is fixed, unless declared, is \$50.00, and the defendant had notice of this by the express wording of paragraph (g).

*The decisions of this Court recognize the binding force of an agreed maximum value in fixing the rate upon the shipper.*

In *Chicago, R. I. & R. Co. vs. Cramer*, 232 U. S., 490, this court said (493) :

“That rule of liability (the uniform rule established by the Hepburn Act) is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property.”

And in *Great Northern Ry. Co. vs. O'Connor*, 232 U. S., 508, this court said :

“But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike and was to be enforced by the courts in fixing the rights and liabilities of the parties. The tariffs are filed with the Commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article or a distinct agreement as to the value of each shipment. If no value is stated the tariff rate applicable to such a state of facts

applies. If, on the other hand, there are alternative rates based on value, and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value."

*Missouri, Kansas & Texas Railway vs. Harriman*,  
227 U. S., 665 :

In an action under a special live stock transportation contract for the value of cattle killed Mr. Justice Lurton said (pp. 668-669) :

"That the shipper had the choice of two rates, one twenty per cent. higher than the other, upon this shipment, is shown by the provisions of the shipping contract and the tariff sheets referred to therein. That the difference between the two rates was not unreasonable, the one when the cattle were not valued and the other when their value was declared, is to be assumed from the acceptance of the rates as filed with the Commission. \* \* \*

"In the case at bar it has been said that the shipper was not asked to state the value, but only signed the contract handed to him and made no declaration. But the same point was made in the Hart Case, when the court said (p. 337) :

" 'A distinction is sought to be drawn between a case where a shipper, on requirement, states the

value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.' \* \* \*

"When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903."

(b) *The bill of lading limited the liability of the shipper to the value on which the rate was charged.*

The court below concluded it did not, because the shipper did not expressly fix the value of the colt and insert it in the bill of lading.

It concludes that the "notice to shipper" directing him to fix a value, had no effect, because he did not fix one,

"and hence this provision cannot be relied on as a basis for fixing the rate of carriage or as a measure of liability when damages are sustained."

The court disregards the notice to the shipper (Record, p. 5),

"the charge for carriage and any liability for damage will be based on such valuation."

The shipper must be held to have notice of the filed tariff.

The tariff rate is based upon valuation, and the fixing of a rate automatically fixed a valuation, and, therefore, the carrier's liability under this notice was limited to such valuation.

The liability for damages being based on such valuation as is taken as the basis of the rate and the shipper

having notice under the decisions of this fact, must be held to have agreed to this valuation.

This is the agreed valuation and is impliedly declared by the shipper.

Clause 1 fixed the charge at \$75.00, "which charge is fixed by and based upon the value of said animals \* \* \*"

Clause 2 recites that the shipper was offered alternative rates according to the tariff of charges recited.

As said by this court in *Cincinnati & Tex. Pac. Ry. vs. Rankin*, 241 U. S., 319, 328:

"But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient prima facie evidence of choice. If in such a case the shipper wishes to contradict his own admissions the burden of proof is upon him.

"The bill of lading in question is plainly entitled 'Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates' and contains the conspicuous provisions concerning published rates, tariff regulations, choice offered the shipper and limit upon the carrier's liability, etc., above set out. In view of these recitals and admissions, the limitation of liability must be treated as prima facie valid, \* \* \*"



Paragraph 6 of the bill of lading provides (Record, p. 7) :

"The Shipper hereby releases and discharges the Express Company from all liability for delay, injuries to or loss of said animals from any cause whatever, unless such delay, injury or loss shall be caused by the negligence of the Agents or employees of the Express Company, and in such event the Express Company shall be liable only to the extent of actual damage to the animal or animals injured, which shall in no event exceed the sum herein declared by the Shipper to be the value thereof; and for the purpose of ascertaining or assessing such damage, whether the same be a total or a partial loss, the value of said animals as herein declared by the Shipper shall be conclusively deemed to be the true value thereof."

This provision expressly limits the liability of the shipper to the actual damage of the animals injured—

"which shall in no event exceed the sum herein declared by the Shipper to be the value thereof; \* \* \* the value of said animals as herein declared by the Shipper shall be conclusively deemed to be the true value thereof."

Paragraph 2 recites that the shipper was advised of the rates to be charged for the carriage of animals and was offered alternative rates proportioned to the value of said animals, such value to be fixed and declared by the shipper, and according to a tariff of charges which provided that :

The first charge was based on a value not exceeding \$50 for the colt; and

The second or alternate charge would be based on the excess valuation,

“over and above the limit of value fixed by the Company’s rates.”

The shipper must therefore be held to have had notice that \$50 was

“the limit of value fixed by the Company’s rate,”

and to have signed the contract with that limit therein, and made that value the agreed value which he impliedly declared to be the value thereof, and which would be the value by which the Company’s liability would be determined under paragraph (6) of the bill of lading.

This bill of lading is very similar to the one before this court in the case of the *Cincinnati, New Orleans & Texas Pacific Railway Co. vs. Rankin*, 241 U. S., 319.

The contract in that case was entitled:

“Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates.”

The contract in this case is entitled:

“Limited Liability Live Stock Contract.”

The contract in that case provides:

“Limit of value \* \* \* That the published

freight rates on live stock of said carrier are, in all cases, based on the following maximum calculations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for

\* \* \* \* \*

Horses or Mules, not exceeding \$75.00 each."

It then provides for an additional charge on value in excess of that amount similar to that in this contract.

The bill of lading in this case provides:

"Notice to Shippers— \* \* \* the charge for carriage and any liability for damage will be based on such valuation"

as the shipper may declare.

That the charge

"is fixed by and based upon the value of said animal as declared by the shipper, as hereinafter mentioned."

That the Shipper was offered alternative rates based on value

"according to following tariff of charges":

"(1) For \* \* \* colts of value not exceeding \$50, each, \$50.00;" and

(2) Upon the "value declared by the shipper, over and above the limit of value fixed by the Company's rate."

This is then followed by the sixth paragraph herebefore recited limiting the liability of the Company to the value declared by the shipper.

This analysis of the bill of lading in this case and that of the Rankin case seem to us convincing that the lower court's conclusion in this case is in the face of the decision of this court in the Rankin case.

We respectfully submit that the State Court erred in its construction of the tariff filed with the commission and the bill of lading, and in its application of the decisions of this court to the facts in this case, and that the plaintiff in error was entitled to the instructions requested but refused by the court below, that the defendant in error was in no event entitled to recover a sum in excess of \$50, with legal interest thereon from the date of the injury.

Respectfully submitted,

CHARLES F. PATTERSON,

FRANCIS R. HARBISON,

*Counsel for American Express Company,*

*Plaintiff in Error.*



Office Supreme Court, U. S.

FILED

MAR 13 1917

JAMES D. MAHER

CLERK

IN THE  
**SUPREME COURT OF THE  
UNITED STATES**

OCTOBER TERM, 1916.

No. 248.

AMERICAN EXPRESS COMPANY,

*Plaintiff in Error,*

vs.

UNITED STATES HORSE SHOE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE  
STATE OF PENNSYLVANIA.

**BRIEF FOR DEFENDANT IN ERROR**

GUNNISON, FISH, GIFFORD & CHAPIN,

*Counsel for United States Horse Shoe Company,  
Defendant in Error.*

W. Pitt Gifford.

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The jurisdiction from which this appeal is taken is re-  
ported as United States Harb. Store Co. vs. American Express  
Co., 250 Pa., 527.

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ERROR TO THE SUPREME COURT OF THE  
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---

**BRIEF FOR DEFENDANT IN ERROR**

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**COUNTER-STATEMENT OF THE CASE.**

On August 23rd, 1903, plaintiff in error, the American Express Company, at Milwaukee, Wisconsin, received from the United States Horse Shoe Company a valuable colt for shipment to Erie, Pennsylvania. The colt was so severely injured on delivery to the consignee at Erie, and while in the custody of the carrier, as to be worthless, and suit was brought for the recovery of damages for the carrier's negligence, resulting in a verdict and judgment against the carrier for \$1,916.80, which was affirmed by the Supreme Court of Pennsylvania.



The carrier interposed the defence of a so-called limited liability live stock bill of lading, claiming that by the provisions of such bill of lading, taken in connection with its schedule of rates, which it appears was filed with the Interstate Commerce Commission at Washington, but not posted or published at Milwaukee, the point of shipment, the carrier's liability was limited to an assumed valuation of \$50.00. The evidence showed that no valuation was asked or given, and the bill of lading was made out by the carrier's agent at Milwaukee with the space for inserting the value of the colt left blank; there was no provision in the bill of lading that the carrier's liability should be limited to an assumed minimum valuation where none was given; and the paragraph in the schedule of rates filed at Washington, containing a limitation of liability to \$50.00, where no valuation was made by the shipper, was declared by the schedule not to apply to live animals. The Supreme Court of Pennsylvania, in sustaining the recovery based upon the actual value of the colt, held that the carrier had a right to limit its liability, but did not do so.

### **COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.**

1. Is there a Federal question involved where the State Court, conceding the validity of the Acts of Congress and the binding effect of the decisions of this Court upon the subject, and the right of an interstate carrier to limit its liability, finds as a matter of fact that the carrier failed to exercise its right, and that no limited liability contract was entered into between the carrier and the shipper?

2. In an interstate shipment of a colt, can the carrier be held to have limited its liability where no declaration of value was asked or made when the bill of lading was given, where the schedule of rates declares that the paragraph limiting liability to \$50.00, unless a greater value was declared by the shipper must not be applied to shipments of live animals, and where the bill of lading in conformity with such declaration of the schedule of rates, contains no provision for a limitation of liability where no valuation is given?

3. In an interstate shipment, can the shipper be charged with notice of the schedule of rates where it appears that such schedule was filed with the Interstate Commerce Commission at Washington, but not published or posted at the point of shipment?

## ARGUMENT.

### I.

#### IS THERE A FEDERAL QUESTION INVOLVED IN THIS CASE?

The Supreme Court of Pennsylvania expressly conceded, in the opinion of Mr. Justice Elkin, the *right* of the plaintiff in error to have limited its liability to fifty dollars; it recognizes the *validity* of the Interstate Commerce Act and the Cormack Amendment thereto; it recognizes the superior authority of the various decisions of this Court based upon the Acts of Congress referred to; it admits that these decisions sustain the general propositions of law relied upon—but it finds that the plaintiff in error failed to exercise its conceded right under the Acts of Congress; that it entered into no contract with the shipper limiting its liability to less than the shipper's actual loss. And we submit, moreover, that the finding upon this point by the Supreme Court of Pennsylvania, like its finding upon the question of the carrier's negligence, is final, and closes the door to further inquiry.

Wherein, then, has "any title, right, privilege or immunity claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States," been denied to plaintiff in error by the Supreme Court of Pennsylvania.

*"The finding by a state court that the facts on which a party relies to bring his case within a statute of the United States do not exist is no decision against the validity of that statute."*

*Crary vs. Devlin, 154 U. S., 619.*

*"We are precluded by the finding of facts in the State Court from looking at the evidence upon which such findings may rest. Upon a writ of error to a state court this Court has no right to review its decision upon the ground that the finding was against the evidence or the weight of the evidence."*

*Thayer vs. Spratt 189 U. S., 346.*

## II.

THE BILL OF LADING CONSTITUTING THE CONTRACT BETWEEN THE CARRIER AND THE SHIPPER, CONTAINS NO VALUATION PLACED UPON THE COLT BY THE SHIPPER AND NO PROVISION THAT IN THE ABSENCE OF ANY SUCH VALUATION BY THE SHIPPER HE WAS BOUND BY AN ASSUMED OR LIMITED VALUATION.

The printed portion of the Bill of Lading (record, page 5), appears to have been prepared by the Express Company with a view of making it possible to limit its liability to a valuation\*to be furnished by the shipper and inserted in the contract. It begins with a notice to the shipper to value his stock, stating that such valuation will be inserted in the contract, and that the charge for carriage and any liability for damage will be based on such valuation.

It provides: "This contract, made at Milwaukee, Wisconsin, this 23rd day of August, 1913, between American Express Company, of the first part, hereinafter called the Express Company, and W. B. Mitchell, hereinafter called the shipper, party of the second part.

1. Witnesseth: That the Express Company undertakes to forward to the nearest point to destination reached by it (or if destined to point beyond its limit, to forward to transfer point convenient to destination, and there deliver to connecting carrier to complete the transportation), the animals hereinafter mentioned, of which the shipper declares himself to be the owner (or duly authorized agent of the owner), to-wit:

(Enter on the following lines, in words, not figures, the number and kind of animals or birds).

1 Mare 1 Colt (300 lbs.) Two; consigned to W. B. Mitchell at Erie, Pa., Erie, Pa., for the sum of Seventy-five Dollars and no cents, which charge is fixed by and based upon the value of said animals *as declared by the shipper as hereinafter mentioned.*"

Clause 2 recites that the shipper demanding to be advised of the rates, was offered alternative rates proportioned to the value of the animals, "*such value to be fixed and declared by the shipper,*" and according to tariffs contained in clause 3.

In clause 3, the Express Company's agent filled in the blanks showing that the express charge on a horse, jack or mule, not exceeding \$100.00 in value, was \$100.00, and that the express charge on a bull, burro, calf or colt not exceeding \$50.00 in value, was \$50.00. This is entirely meaningless, was not a correct rate, was not the rate charged the shipper, was sought to be explained away by the plaintiff in error at the trial, and gave absolutely no notice to the shipper that the rate he was being charged was based upon an "implied," "agreed," or "minimum" valuation, or had any relation to the value of the animals.

Clause 4 sets out the charges for any excess valuation *declared by the shipper.*

Clause 5 provides: "The shipper, in order to avail himself of said alternative rates," (which had not been furnished him), "and in consideration thereof being asked by the Express Company to value said property, now declares the value hereinafter mentioned to be the true value of said animals so to be shipped as follows, to-wit:

(Number and kind).....value each \$.....

(Number and kind).....value each \$.....

(Number and kind).....value each \$.....

(Shipper must in all cases be required to declare value.)"

Here we come to the consummation of the whole scheme for limiting the carrier's liability, the point on which the entire plan hinged, to which every prior clause pointed the way, the declaration of the value which the carrier was to get from the shipper and insert in its contract, and no such valuation is either asked for, given or inserted. The carrier could not have done less if it had deliberately set out to waive its right to limit its liability. The carrier was required by the statute to issue a Bill of Lading, but whether it proceeded to fill out its printed form of Bill of Lading so as to constitute a limited liability contract between the parties, was a matter entirely within its own control. It was a free agent, and could do so or refrain from doing so. In the light of these facts, can there be any doubt of the propriety and correctness of the conclusion reached by the Supreme Court of Pennsylvania (record page 94) in these words: "We concede that appellant could have limited its liability to \$50.00, as is contended, but it did not do so in the Bill of Lading by requiring the shipper to declare a value nor by inserting in the clause relating to alternative rates any value whatever."

The shipper is not to be tricked or trapped into a relinquishment of his rights to recover his actual loss resulting from the negligence of the carrier. If the carrier bargained away its common law responsibility, it must have done so by a fair, open, just and reasonable agreement, and not by a hidden subterfuge. The shipper was not asked to put any value on the colt as a basis of determining the rate of carriage, and consequently he did not do so. Obviously, therefore, he was not bound by any valuation he had placed upon his property for the purpose of securing a more favorable rate, for he had given none. There was no "agreed valuation" because the minds of the parties never met. If his silence is to be interpreted into an agreement for a limitation of the carrier's liability, it must be upon some theory or other of notice to him that in the absence of a specific valuation, he was bound by an implied minimum valuation. We have searched the carefully prepared paragraphs of this Bill of Lading in vain to discover any stip-

ulation that the liability of the Express Company was to be limited to an assumed minimum valuation unless a greater value was declared at the time of shipment. In fact the first clause of the Bill of Lading recites that the express rate or charge of \$75.00 is "fixed by and based upon the value of said animals *as declared by the shipper* hereinafter mentioned." This certainly negatives any notice to the shipper that he was bound by an assumed valuation in the absence of one furnished by him. The carrier framed its scheme for limiting its liability *entirely* around the valuation to be fixed by the shipper, and then failed to get or even to ask for such valuation, and issued to him a contract of carriage entirely devoid of any such limitation. Can there be any doubt, therefore, of the failure of the carrier to effect a limitation of its liability?

Is there no duty resting upon the carrier with reference to the fair, open, just and reasonable agreement which this court has said in the Croninger case is the condition of a limitation of its liability? Can the express company, through its agent, without asking the shipper to value his colt, without offering him any choice of rates based upon his valuation, hand him a bill of lading in which it inserts no valuation of any kind, and without a word of warning verbally or in the bill of lading that his silence when not asked for a valuation will be construed as assenting to an "assumed" valuation, be held to be a "fair, open, just and reasonable" agreement by which he has bartered away his right to recover from the carrier his actual loss in case of the carrier's negligence. This is a game in which the shipper is beaten before he begins and never has a chance. The responsibility for getting a valuation from the shipper rests with the carrier. The "shipper must in all cases be required to declare value." (Bill of Lading, end of clause 5). Whose duty is it to require the declaration of value but the express company which makes out the Bill of Lading?

## III.

THE SCHEDULE OF RATES FILED WITH THE INTERSTATE COMMERCE COMMISSION DOES NOT LIMIT THE CARRIER'S LIABILITY FOR LIVE ANIMALS TO AN ASSUMED MINIMUM VALUE OF FIFTY DOLLARS WHEN NO VALUE IS ASKED OR GIVEN.

The argument of plaintiff in error proceeds upon the theory that the shipper was presumed to have notice, and therefore knowledge, of the contents of its schedule of rates, whether he ever saw them or not. Assuming, for the sake of the argument, that the shipper had had Exhibit C (record, page 80) before him, and had undertaken to ascertain from it on what basis he was to be charged for the carriage of his mare and colt, he would have been informed by paragraph (a) that "the rates governed by this classification are based upon a value of not exceeding \$50.00 on each shipment of 100 lbs. or less." (this would be ridiculous as applied to a horse), "and not exceeding 50 cents per pound, actual weight, on each shipment weighing more than 100 lbs., and the liability of the express company is limited to the value above stated" (that would be \$50.00 for a horse of 100 lbs. or less) "unless a greater value is declared at the time of shipment, and the declared value in excess of the value above specified" (still having in mind \$50.00 for a hundred pounds or less) "is paid for, or agreed to be paid for, under the schedule of charges for excess value in paragraph (c) of this rule." This paragraph is so manifestly not intended to cover the shipment of a horse that the shipper would pass it by as having no possible application to his case.

Paragraph (b) provides for determining the value by the invoice, if there is one, unless a higher value is declared, and has no application here.

Paragraph (c) provides the schedule of charges for a value declared by the shipper exceeding fifty dollars on a hundred pounds or less, refers to the same class of objects as paragraph (a), and obviously has no application to the shipment of a horse.

We now come to the declaration in paragraph (d) that "These charges" (that is, the valuation charges recited in paragraphs (a), (b), and (c) preceding) "must not be applied to live animals, live birds, or live stock (see paragraph (g))". This is the first information imparted to the shipper by the schedule of rates having any application to the shipment of a horse, and turning to paragraph (g), as directed, he finds this provision:

"Valuation charges on Live Animals, Live Birds, or Live Stock:

"The Classification Rates on Live Animals, Live Birds, or Live Stock apply only when the *declared value* does not exceed the following:

Horse, Jacks or Mules, \$100.00 each.

Bulls, Burros, Calves, Colts," etc., "\$50.00 each."

*Declared value* is the criterion for the application of the Classification Rates on Live Animals. There is not a word of repetition or reference to indicate that the provision of paragraph (a) relating to shipments not exceeding \$50.00 in value on 100 lbs. or less, has any application here.

It is reasonable enough, perhaps, for the express company to provide that its liability shall be limited to fifty dollars unless a greater value is declared at time of shipment, upon the thousand and one articles weighing less than a hundred pounds which are daily offered for shipment at the express offices, a large proportion of which are worth less than fifty dollars, and on which it is often difficult to fix a definite value; but when it comes to animate objects, live animals worth enough to be shipped by express, *declared value* becomes at once the test and basis for the charge. Otherwise, the carriage charges would frequently equal or exceed the "assumed" value of the shipment. Any other construction than this would violate the "reasonable" basis of limitation required by the Croninger case.



That this was the construction placed upon its schedule of rates by the plaintiff in error is evident from the fact that the *declared valuation* is the basis of the charges as set forth in its Bill of Lading.

Paragraph (g) of the schedule of rates is copied almost verbatim into its limited liability Bill of Lading, and from the first "Notice to Shippers" through clause after clause of the Bill of Lading is reiterated the importance of having the shipper declare the value of his stock. There is not a word of warning in the live stock Bill of Lading before us, not a suggestion to the shipper, that his silence will be construed as assenting to a valuation of fifty dollars, or that on his failure to declare a value the express company will "assume" the value to be fifty dollars.

The logic of the conclusion reached by the Supreme Court of Pennsylvania is therefore apparent. They say (record, bottom page 93):

"In paragraph (a) it is provided that the liability of the express company is limited to the value above stated unless a greater value is declared at time of shipment, and this is relied on by appellant as fixing the extent of its liability in the absence of a declaration of value by the shipper. The complete answer to this position is found in paragraph (d) wherein it is provided that, These charges (referring to paragraphs a, b, c) must not be applied to live animals, live birds or live stock (see paragraph (g)). The only reasonable interpretation of this language is that paragraphs a, b and c have no reference to live animals which come under paragraph (g.) But paragraph (g) contains no provision, as does paragraph (a), limiting the liability of the express company to the minimum valuation stated in the schedule of rates. We are not at liberty to read into this paragraph what it does not contain. Paragraph (a) evidently relates to the charges for the shipment of inanimate objects, and the limitation written into this paragraph, must be regarded as referring to the subject to which it relates.

The limitation was not written into paragraph (g), which relates to live animals, and it would be forcing the answer to say that a shipper of such animals had thus been given notice of a limited liability which the schedule applicable to such shipments did not contain."

The fallacy of the argument of plaintiff in error upon this branch of the case (heading "V" on page 38 ff. of its brief), is that paragraph (a) of the schedule of rates (record, page 80) "fixes the basic value, the unit upon which the rates and charges named in the whole subdivision, called valuation charges, are fixed." It is perfectly clear that a value of fifty dollars on a hundred pounds or less is not the "unit" upon which rates and charges for horses are based. Paragraph (g) furnishes its own "unit" of value, and that "unit" applies only when the *declared value* does not exceed fifty dollars. Paragraph (g) is self-explanatory, is entirely independent of paragraph (a), and is carried into the limited liability bill of lading of plaintiff in error bodily, as sufficiently defining and fixing the rights and liabilities of the carrier and shipper, without reference to any provision of paragraph (a),—clearly because paragraph (a) had relation to another and totally different class of shipments. Paragraph (g) clearly indicates what was intended by it and requires neither support nor explanation from paragraph (a). Further, that is no "limit of value fixed by the company's rate," as suggested on page 49 of the brief of plaintiff in error, because

(1). The rate for carriage in this case as set forth in clause 1 of the Bill of Lading, \$75.00, was expressly declared therein as "fixed by and based upon the value of said animals as declared by the shipper, as hereinafter mentioned" (but there was no declared value asked for or thereafter mentioned.)

(2). The rate or charge inserted in the Bill of Lading (Clause 3) was not a rate at all, and is not pretended to be.

## IV.

THE PROVISIONS RELIED ON BY THE PLAINTIFF IN ERROR IN ITS BILL OF LADING AND ITS SCHEDULE OF RATES HAVING BEEN PREPARED BY THE CARRIER FOR THE PURPOSE OF LIMITING ITS COMMON LAW LIABILITY, THEIR LANGUAGE SHOULD, ON WELL RECOGNIZED PRINCIPLES OF CONSTRUCTION, BE CONSTRUED MOST STRONGLY AGAINST THE CARRIER.

In *Texas & Pacific Railway Co. vs. Reiss*, 183 U. S., 621, the carrier sought to avail itself of the provisions of a limited liability bill of lading, and it therefore came under the consideration of the Court. In construing it, Mr. Justice Peckham said: "The Bill of Lading itself is an elaborate document bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities; and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument and as the court is to interpret such language it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in *First National Bank vs. Hartford Fire Insurance Co.*, 95 U. S., 673, 679, 'both reasonable and just that its own words should be construed most strongly against itself.' "

Again in the case of *London Assurance Co. vs. Companhia de Moagens do Barreiro*, 167 U. S., 149, 159, this Court said: "If the company, by the use of the expression found in the policy, leaves it a matter of doubt as to the true construction to be given the language, the Court should lean against the construction which would limit the liability of the Company." (Citing *National Bank vs. Insurance Co.*, 95 U. S. 673.)

And in the *Queen of the Pacific*, 180 U. S., 49, (52), Mr. Justice Brown in discussing the provisions of a Bill of Lading, said: "There is no doubt of the general proposition that re-

strictions upon the liability of a common carrier, inserted by him in the Bill of Lading for his own benefit and in language chosen by himself, must be narrowly construed."

Clearly, therefore, the doubt, if any existed, as to whether the language of paragraph (g) of the schedule of rates included the provisions of another and independent paragraph (a), should be resolved against the carrier.

V.

IT WAS INCUMBENT UPON THE PLAINTIFF IN ERROR TO PUBLISH OR POST ITS TARIFFS OR SCHEDULE OF RATES AT THE POINT OF SHIPMENT, AND ITS FAILURE TO DO SO IS FATAL TO ITS CONTENTION IN THIS CASE.

The Supreme Court of Pennsylvania found (Record, p. 92) that: "The schedule of rates was not published at Milwaukee, where the colt was received for shipment, at least there was no evidence to show such publication, and counsel for appellant seems to concede this as a fact in the argument of his case. The only contention made here in this respect is that the rates were filed with the Interstate Commerce Commission at Washington and that this was a sufficient compliance with the law to charge the shipper with notice."

The Interstate Commerce Act as amended June 29, 1906, Sec. 6, provides, *inter alia*, as follows: "Such schedule shall be plainly printed in large type and copies for the use of the public shall be posted in two public and conspicuous places in every depot or office of such carrier where passengers or freight respectively are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

The defendant in error, the shipper in this case, has always denied that the filed rates were exhibited to its agent who offered the animals for shipment; the carrier offered no evidence at the trial that its schedule of rates was posted at Milwaukee, the point of shipment; the appellant in its paper book sub-

mitted to the Supreme Court of Pennsylvania claimed only that the schedule of rates was filed at Washington, and in the argument before that court, Counsel for appellant conceded that they were not posted at Milwaukee; and the State Court found *as a fact* that they were not posted or published at the point of shipment. This finding of fact by the State Court on the basis of authorities already cited, should be conclusive here, and can not be overborne by the mere presumption that the business of the carrier is being conducted lawfully. The plaintiff in error, being then in default by having failed to publish its tariffs in accordance with the strict requirements of the Interstate Commerce Act and amendments, is precluded from claiming the advantage which a proper compliance with the provisions of the Statute might have given it. As Mr. Justice Elkin said (Record, p. 92): "No case has been called to our attention, and we know of none, in which it has been held that a carrier may disregard the provisions of the Act relating to publication of the schedules and still be entitled to every benefit that results from a proper compliance with the law. *Under the facts of the case at bar* we are of opinion that the shipper was not charged with notice of the valuation upon which the rate of carriage was based by anything which may have appeared in the schedule filed with the Interstate Commerce Commission, but which was not posted at the place of shipment as required by the Federal Statute."

## VI.

A CAREFUL EXAMINATION OF THE VARIOUS AUTHORITIES CITED IN THE BRIEF OF PLAINTIFF-IN-ERROR SHOWS THAT THE CASE AT BAR STANDS APART FROM ANY ADJUDICATION OF THIS COURT UPON THE QUESTION OF LIMITATION OF LIABILITY BY CARRIERS.

In *Cincinnati & T. P. R. Co. vs. Rankin*, 241 U. S. 319, the limited liability contract signed by the shipper expressly provided, *inter alia*: "that the said shipper, in order to avail himself of said published freight rates, agrees that said carrier

shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above" (not exceeding \$75.00 each) "which are hereby agreed to be not less than the just and true values of the animals, *unless an additional amount is herein stated and paid for.*" This court said, furthermore, in the opinion: "The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability."

In *Missouri, Kansas & Texas Ry. vs. Harriman*, 227 U. S. 657, the Live Stock rate sheets provided for a choice between two rates, one with and one without a declared valuation, and the bill of lading stipulated that in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, the shipper shall recover "in no instance more than the stipulated valuation shown above." (bull \$30, cow \$20).

In *Kansas City Southern Ry. vs. Carl*, 227 U. S. 639, involving a shipment of household goods, the contract between the shipper and the carrier provided that the shipper "releases the said company from all liability for any loss or damage said property may sustain in excess of \$5 per 100 lbs." and the tariff sheets showed two rates on household goods, one "when released to \$5 per hundred and a higher rate when not so released."

In *Chicago, R. I. & P. Ry. Co. vs. Cramer*, 232 U. S. 490, the decision went no further than to hold that where a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property. It appears also that the shipper represented that the value of the hogs did not exceed \$10 per head, to secure the benefit of the lower rates, and that the recovery for a larger valuation was sustained by the Iowa courts because of a state statute forbidding contracts exempting carriers from liability for negligence.

In *Great Northern Ry. Co. vs. O'Connor*, 232 U. S. 508, the agent of the shipper filled out a bill of lading, describing the shipment, "Released to \$10 per cwt." as in the Carl case, the low value having been named by the shipper to secure the cheaper rate.

In *Boston & Maine R. R. Co. vs. Hooker*, 233 U. S. 97, it was held that the valuation of \$100 attached automatically to the baggage of plaintiff, there being a clear provision and notice in the schedules that "Baggage liability is limited to personal baggage not to exceed \$100 in value \* \* \* unless a greater value is declared and stipulated by the owner and excess charges paid thereon at the time of checking the baggage."

*New York C. & H. R. R. Co. vs. Beaham*, 242 U. S. 148, is also a case of lost baggage carried upon a first class passenger ticket, purchased subject to the following contract printed on the face of it: "Baggage liability is limited to wearing apparel not to exceed \$100 for a whole ticket and \$50 for a half ticket unless a greater value is declared by the owner, and excess charge paid thereon at the time of taking passage."

*Adams Express Co. vs. Croninger*, 226 U. S. 491, was a case based upon the loss of a ring enclosed in a sealed package and the bill of lading contained the express provision that: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof, and is based upon a valuation of not exceeding \$50 unless a greater value is declared, the shipper agrees that the value of said property is not more than \$50, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than \$50 if no value is stated herein."

In *Pierce vs. Wells Fargo & Co.*, 236 U. S. 278, the shipping receipt contained the express provision: "Nor in any event shall said company be held liable beyond the sum of \$50, at not exceeding which sum the said property is hereby valued, unless a different value is hereinabove stated." Before the shipment moved, the agent of the express company, a second



time, called the attention of the shipper to the absence of declared valuation, inquired whether such valuation had been intentionally omitted, and whether the property was insured, and was told that the omission was intentional and that the property was insured. This is a case, therefore, where the shipper deliberately and intentionally, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to \$50, the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper.

In *Atchinson, Topeka & Santa Fe Railway Co. vs. Robinson*, 233 U. S., 173, the shipment of a horse was accepted by the railroad company on a verbal arrangement, and later a printed and written contract was signed by the shipper, in which it appears he represented the value of the horse not to be in excess of a hundred dollars, and thereby obtained the reduced rate based upon the value as given by the shipper. It was held that the shipper was bound by the written contract made in conformity with the schedule of rates, rather than by the verbal arrangement, and that he was limited in his recovery to the value declared by the shipper and inserted in the contract.

It must be apparent, therefore, that this court has never, heretofore, recognized the right of a carrier to divest itself of liability for negligence, or limit such liability to an arbitrarily assumed amount, wholly disproportioned to the actual value of the shipment, without having clearly set forth in its schedule of rates or bill of lading that the shipper is bound by or assents to the assumed valuation unless a greater value is declared by him at the time of shipment, or where the carrier issues to the shipper a bill of lading purporting to base its rate of carriage and liability wholly upon a valuation to be declared by the shipper, to be inserted in the contract by the carrier, and either purposely or carelessly, wholly omits to either ask, obtain or insert any such valuation.

Congress, by the Cummings amendment of 1915 to the Interstate Commerce Act, having placed it beyond the power



of the carrier to divest itself of liability as here contended for, the question involved here has become, so far as affording a precedent for future adjudication, largely an academic one.

To sustain the contention of the plaintiff in error here would, we submit, violate both reason and precedent. It would be depriving the shipper of his right to recover from a common carrier his actual loss occasioned by the negligence of the carrier, and limiting his recovery to an arbitrary sum unrelated to the value of the goods lost, and this without any representation of value made by him, or asked of him, and without any notice to him of a limitation of liability to an assumed valuation in case he failed to place a value upon his property. It would result in relieving the carrier of its well recognized common law liability without the "fair, open, just and reasonable agreement" which the decisions of this Court have uniformly stipulated to be a condition of such limitation.

This Court ought not to be asked to relieve a carrier from liability where it has not taken the trouble to relieve itself.

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We respectfully submit, therefore, that the judgment of the Supreme Court of Pennsylvania should be affirmed.

GUNNISON, FISH, GIFFORD & CHAPIN,

*Counsel for United States Horse Shoe  
Company, Defendant in Error.*

